

2011

# Newport's Mooring Regulations: Legal and Policy Analysis

Jenna Algee

*Sea Grant Law Fellow, Roger Williams University School of Law*

Follow this and additional works at: [https://docs.rwu.edu/law\\_ma\\_seagrant](https://docs.rwu.edu/law_ma_seagrant)



Part of the [Land Use Law Commons](#), and the [Natural Resources Law Commons](#)

---

## Recommended Citation

Algee, Jenna, "Newport's Mooring Regulations: Legal and Policy Analysis" (2011). *Sea Grant Law Fellow Publications*. 29.  
[https://docs.rwu.edu/law\\_ma\\_seagrant/29](https://docs.rwu.edu/law_ma_seagrant/29)

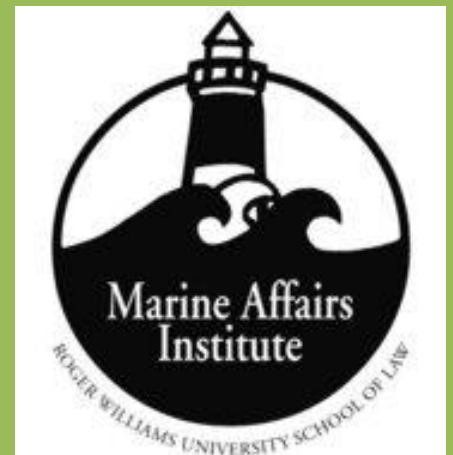
This Document is brought to you for free and open access by the Marine Affairs Institute at DOCS@RWU. It has been accepted for inclusion in Sea Grant Law Fellow Publications by an authorized administrator of DOCS@RWU. For more information, please contact [mwu@rwu.edu](mailto:mwu@rwu.edu).

# 2011

## Newport's Mooring Regulations: Legal and Policy Analysis



Jenna Algee, *Juris Doctor* candidate 2011  
Marine Affairs Institute  
Roger Williams University School of Law  
Rhode Island Sea Grant



## Table of Contents

I.	Introduction.....	2
II.	Rhode Island’s Public Trust and Regulatory Framework .....	3
III.	Statutory Compliance of Newport’s Mooring Regulations.....	10
A.	Compliance with Rhode Island’s Army Corps General Permit .....	11
B.	The PTD Compatibility Requirement .....	11
IV.	Public Trust Doctrine Applied to Newport’s Mooring Regulations .....	13
A.	The Nature of the Property Interest Conveyed by a Mooring Permit .....	13
1)	Right to Exclude .....	15
2)	License Revocability .....	15
3)	Alienability .....	16
B.	Compatibility of Moorings with the Public’s Interest.....	18
1)	In Furtherance of the “Public Interest”?.....	20
a)	Traditional Public Trust Uses .....	20
b)	Broader Public Interest Test.....	21
2)	Minimal Impact on the Public’s Use?.....	23
V.	Private: Commercial Mooring Ratio .....	25
VI.	Resident: Non-Resident Ratio.....	26
VII.	Mooring Underutilization .....	29
VIII.	Mooring Fee Profit and The Maritime Enterprise Fund .....	33
IX.	Conclusion .....	38
	Appendix A: Reference Guide for Comparing Other Municipalities’ Ordinances.....	39

## I. Introduction

This Rhode Island Sea Grant Law Fellow report was prepared for the Newport Waterfront Commission of Newport, Rhode Island (Commission). It discusses legal and policy issues surrounding Newport's boat mooring ordinances and practices. The great importance of moorings to Newport's residents and tourists necessitated this report.

Moorings greatly enhance the economies of Newport and of the state of Rhode Island. Research on Rhode Island tourism in 2006 confirmed that tourism employed 10% of Rhode Islanders.<sup>1</sup> This includes tourism-supported businesses, like restaurants and hotels, which receive up to 40% of their revenue from tourism.<sup>2</sup> Tourism in Newport is particularly dependent on water access. A 2010 economic study concluded that "activities on the water and public access to the water define the overall attractiveness of Newport Harbor."<sup>3</sup> Water-facilitated tourism in turn contributes to the taxable sales and property values of many businesses, especially from Newport's many restaurants, entertainment, and hotel businesses.<sup>4</sup>

In the United States, there is an "increased population adjacent to coastal waters [and] tourism and recreational use...is increasing."<sup>5</sup> Newport is on the forefront of this national phenomenon. The high demand for moorings is demonstrated in Newport's 474 applicant waiting list, which amounts to a minimum waiting time of 10-15 years, increasing as demand grows.<sup>6</sup> On the average, 10 to 15 moorings become available for new applicants each year.<sup>7</sup> The rising numbers of registered boats, the lack of slip space, and the stress on public launching ramps intensify the need for moorings.<sup>8</sup> The state carries a load of 3,000 applicants waiting for

---

<sup>1</sup> Kenneth McGill, *How Important is Tourism to Rhode Island? 2006 Tourism Satellite Account*, (Global Insight 2006), available at [http://www.visitrhodeisland.com/pdf/2006\\_TSA\\_Report.pdf](http://www.visitrhodeisland.com/pdf/2006_TSA_Report.pdf).

<sup>2</sup> Id.

<sup>3</sup> FXM Associates, *The Contribution of Waterfront Land Uses to Municipal Revenues in Newport, Rhode Island* (Aug 2010), available at [http://www.cityofnewport.com/departments/planning-zoning/pdf/Harbor\\_Summary\\_08-06-2010.pdf](http://www.cityofnewport.com/departments/planning-zoning/pdf/Harbor_Summary_08-06-2010.pdf).

<sup>4</sup> Id. ("The patrons of activities and uses on the water (especially recreational boaters and excursion vessel customers) spend considerable amounts at waterfront area businesses and, therefore, contribute to the taxable property value and sales of commercial uses such as restaurants and retail shops").

<sup>5</sup> Barbara A. Vestal, *Dueling with Boat Oars, Dragging through Mooring Lines: Time for More Formal Resolution of Use Conflicts in States' Coastal Waters?* 4 Ocean & Coastal L.J. 1, 4 (1999).

<sup>6</sup> Personal Communication with Hank Kniskern (E-mail received April 27<sup>th</sup>, 2010).

<sup>7</sup> Id.

<sup>8</sup> Climbing boat registration rates have exceeded other New England states and even the national average. See Aquidneck Island Planning Commission, West Side Task Force, Aquidneck Island West Side Master Plan, Chapter 4, *Planning Context*, pg. 5 (2005), available at <http://www.aquidneckplanning.org/westsidemast.html>.

slip space.<sup>9</sup> The Rhode Island Coastal Resources Management Council has recognized these issues, stating:

The growth in the size of the recreation fleet, limited berthing opportunities and the increasing expense of in-water storage have contributed to rapid growth in the number of trailered boats. This has placed a heavy demand on public launching ramps, which are in short supply and many of which are in deteriorating condition or have limited parking capacity.<sup>10</sup>

Given the centrality of water access to Newport's economy and the increasing demands it will experience, responsible management of available mooring spaces is crucial.

This report facilitates the timely discussion of Newport's regulatory system for moorings by providing background legal and policy information. One of the Commission's most fundamental concerns has been understanding the Public Trust Doctrine (PTD) and its application to boat moorings in Newport. This report addresses this concern against the backdrop of the regulatory controls on Newport's decision-making in Section II. The more specific application of public trust principles to moorings depends on two primary legal questions: (1) the nature of the property interest a mooring holder has in his or her mooring permit and (2) the interaction between moorings and the general public's right to use public trust waters, each of which is examined in Section IV (A) and (B), respectively. Additionally, this report explores some key specific aspects of Newport's mooring scheme: the commercial-individual mooring ratio; the resident-nonresident ratio; mooring underutilization; and mooring fee profits.<sup>11</sup>

## **II. Rhode Island's Public Trust and Regulatory Framework**

This section explains the principles and foundations of the PTD in the United States and its adoption by Rhode Island. It explores the role of the doctrine in defining federal, state, and local regulatory responsibilities. This section also serves as a background for delineating the relationship between government actors that play a role in public trust administration.

---

<sup>9</sup> *Id.*, citing Rhode Island Marine Trades Association.

<sup>10</sup> Coastal Resources Management Council, Rhode Island Coastal Resources Management Program §200.3 (December, 2010), available at <http://www.crmc.ri.gov/regulations/RICRMP.pdf> (The Red Book).

<sup>11</sup> Please note that the terms license and permit are used interchangeably in this report. Permit is defined as "a certificate evidencing permission; a license." *Black's Law Dictionary* (9<sup>th</sup> ed. 2009). A license is defined as "a permission, usu. revocable, to commit some act that would otherwise be unlawful..." *Id.* Please also note that "commercial moorings" refers to a classification of moorings that can be used for rental moorings. This is the official language used in the Newport mooring ordinance.

The PTD was developed from the natural law principle and universal understanding that some natural resources are so important to society that they are “incapable of individual exclusive appropriation”.<sup>12</sup> One of the underpinnings of the PTD is that “water, being a vital and uncultivable resource, should be free of the monopolizing effect of private ownership.”<sup>13</sup> In accordance, the law developed to vest the states, rather than private parties, with title to submerged land. The states serve as “trustees” to protect the public’s right to use the waters above those lands.<sup>14</sup>

In England, title to tidal water was vested in the King, to hold for the “benefit of the nation.”<sup>15</sup> That title had two components: “*jus privitum*” (the government’s title) and “*jus publicum*” (the public’s interest, the right to use). The *jus publicum* created a regulatory responsibility for the government to administer the trust in the public’s best interest. The *jus privitum* was transferred from the King to each of the original states upon the American Revolution<sup>16</sup> and to the remaining states upon succession.<sup>17</sup>

The United States Congress clarified that the states, rather than the federal government, are the trust administrators when it enacted the Submerged Lands Act (SLA).<sup>18</sup> The SLA extends the state’s police powers to a distance three miles from the shore, providing it with regulatory power over its public trust waters.<sup>19</sup> In doing so, Congress recognized that the best way to manage public trust resources was state-by-state. Moreover, the United States Supreme

---

<sup>12</sup> Berkeley v. Super. Ct. of Alameda County, 606 P.2d 362, 364 (Cal. 1980).

<sup>13</sup> Mark Cheung, Comment, *Dockominiums: an Expansion of Riparian Rights that Violates the Public Trust Doctrine*, 16 B.C. Env’tl. Aff. L. Rev. 821, 836 (1989), citing Shively v. Bowlby, 152 U.S. 1, 57 (1894). See Shively, available at <http://supreme.justia.com/us/152/1/case.html>. See, also, Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 358 (Mass. 1979) (“Throughout history, the shores of the sea have been recognized as a special form of property of unusual value and therefore subject to different legal rules from those which apply to inland property”).

<sup>14</sup> Trustee is “one who stands in a fiduciary or confidential relation to another; esp., one who, having legal title to property, holds it in trust for the benefit of another [the public as applied here] and owes a fiduciary duty to that beneficiary [the public].” Black’s Law Dictionary (9<sup>th</sup> ed. 2009). See, also, 90 C.J.S. *Trusts* §1 (West 2011) (providing a useful definition of trust as the “beneficial enjoyment of property, the legal title to which is vested in another”).

<sup>15</sup> Shively v. Bowlby, 152 U.S. 1, 57 (1894), available at <http://supreme.justia.com/us/152/1/case.html>.

<sup>16</sup> Id. Also note that the American concept of public trust differs from the English common law in its definition of the “ordinary high tide” line as the “edge of the sea”. Id.

<sup>17</sup> This concept is called the “equal footing doctrine” and is explained in Shively v. Bowlby, Id. See also Black’s Law Dictionary (9<sup>th</sup> ed. 2009) (defining the equal footing doctrine as “the principle that a state admitted to the Union after 1789 enters with the same rights, sovereignty, and jurisdiction within its borders as did the original 13 states.”)

<sup>18</sup> 43 U.S.C.A. § 1311 (West 2011); 43 U.S.C. § 1311, available at [http://www.law.cornell.edu/uscode/uscode43/usc\\_sec\\_43\\_00001311----000-.html](http://www.law.cornell.edu/uscode/uscode43/usc_sec_43_00001311----000-.html).

Court recognized the special importance of local administration of harbors.<sup>20</sup> The principle of local harbor autonomy has further developed in courts throughout the United States and has been specifically applied to moorings.<sup>21</sup> The First Circuit Court of Appeals, which has jurisdiction over Rhode Island, shared in this view when it held that boat user fee regulations were not pre-empted by any federal law.<sup>22</sup> Thus, as a general rule, mooring regulations are largely left to state and local governments. At the same time, the federal government is not without a limited role in the administration of local harbors, an issue explored at the end of section II.

State and local governments have discretion in interpreting the PTD.<sup>23</sup> The United States Supreme Court provided a starting point for states in the development of state public trust law in the case of Illinois Central.<sup>24</sup> Illinois Central's central guidelines are "considered the foundation of the public trust doctrine in United States law."<sup>25</sup> The standards in that case provide a minimum "floor" for determining state public trust obligations.<sup>26</sup> In other words, the state must follow Illinois Central's basic protections of the public trust, but may also add an additional layer of protection with state common law, statutes, or administrative regulations.<sup>27</sup>

---

<sup>19</sup> 43 U.S.C.A. § 1312 (West 2011); 43 U.S.C. § 1312, *available at* [http://www.law.cornell.edu/uscode/33/usc\\_sec\\_33\\_00001312----000-.html](http://www.law.cornell.edu/uscode/33/usc_sec_33_00001312----000-.html).

<sup>20</sup> Cushing v. Owners of The John Fraser, 62 U.S. 184, 187-188 (1858), *available at* <http://supreme.justia.com/us/62/184/case.html>. *See also* Gibbons v. Ogden, 22 U.S. 1 (1824), *available at* <http://supreme.justia.com/us/22/1/case.html>.

<sup>21</sup> "There is no reason to believe that Congress intended to occupy the field in the area of mooring" Beveridge v. Lewis, 939 F.2d 859, 864 (9<sup>th</sup> Cir. 1991), *available at* <http://ftp.resource.org/courts.gov/c/F2/939/939.F2d.859.90-55642.html>; "anchorage and mooring are not subject areas that are particularly federally sensitive in nature" Barber v. Hawaii Hawaiian Navigable Waters Preservation Soc'y, 42 F.3d 1185, 1194 (9<sup>th</sup> Cir. 1994), *available at* <http://openjurist.org/42/f3d/1185/barber-v-state-of-hawaii-hawaiian-navigable-waters-preservation-society>.

<sup>22</sup> LCM Enter. v. Dartmouth, 14 F.3d 675, 684 (1<sup>st</sup> Cir. 1994), *available at* <http://ftp.resource.org/courts.gov/c/F3/14/14.F3d.675.93-1536.html>.

<sup>23</sup> *See* Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 Suffolk. U. L. Rev. 313, 327 (1999) (referring to Phillips Petroleum, "the decision appears to give states substantial flexibility in the definition and scope of their public trust authority"). *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988), *available at* <http://supreme.justia.com/us/484/469/index.html>.

<sup>24</sup> *See* Appleby v. City of New York, 271 U.S. 364, 394 (1926) (explaining that Illinois Central "was necessarily a statement of Illinois law" but emphasizing that the "general principle and exception [of Illinois Central] has been recognized the country over"), *available at* <http://supreme.justia.com/us/271/364/case.html>. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892), *available at* <http://supreme.justia.com/us/146/387/>.

<sup>25</sup> Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 Suffolk. U. L. Rev. 313, 320 (1999).

<sup>26</sup> Crystal A. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 Hastings W.-N.W. J. Envtl. L. & Pol'y 113, 150, 159 (2010). ("State courts' use of state constitutional provisions to articulate or expand the public trust does not run contrary to the theory of Illinois Central as grounded in federal law. Instead, these interpretations are compatible with an understanding of Illinois Central as establishing a federal common law "floor" limitation on state power, upon which states are free to expand using state law.")

<sup>27</sup> *See* Shively v. Bowlby, 152 U.S. 1, 57 (1894), *available at* <http://supreme.justia.com/us/152/1/case.html>.

Under Illinois Central, states can convey some property rights in public trust waters to private parties, but the state's *jus publicum* responsibility cannot be extinguished.<sup>28</sup> The state's management of tidelands is thus unalienable.<sup>29</sup> Proper administration of the *jus publicum* trust further requires that, before granting any property interest to a private party, the government determines (a) the conveyance is itself in furtherance of a public interest, or (b) the conveyance has no substantial impairment to the public interest in the tidelands.<sup>30</sup>

Rhode Island's public trust protection closely parallels Illinois Central. The Rhode Island Constitution incorporates the PTD in the state Constitution, explicitly recognizing the public's "rights to the use and enjoyment of the natural resources of the state."<sup>31</sup> While the public's right to use traditionally consisted of a triad of fishing, navigation, and commercial rights<sup>32</sup>, the Rhode Island Constitution also protects public fishing, swimming and collecting seaweed.<sup>33</sup>

Additionally, the 1971 Rhode Island General Assembly passed a law that no *absolute* title may be transferred to private parties except by explicit grant by the General Assembly after finding such transfer consistent with public trust uses.<sup>34</sup> With regard to leasing public trust resources, the statute provides that before any lease of tidal land or license for exclusive use can be granted to private parties, it must be "specifically approved for public trust purposes."<sup>35</sup> In other words, it requires *compatibility with the PTD*. The lease compatibility determination can be made by either the General Assembly or a designated government body.<sup>36</sup> Because delegation provision does not offer specific guidance with regards to moorings, it is unclear exactly which government body is responsible for the PTD compatibility determination. The issue is complicated by the interaction of the Coastal Resources Management Council's (CRMC) regulatory authority with that of the City of Newport.

---

<sup>28</sup> See Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892), available at <http://supreme.justia.com/us/146/387/>.

<sup>29</sup> Id. See also Berkeley v. Super. Ct. of Alameda County, 26 Cal.3d 515, 521, 606 P.2d 362, 365 (Cal. 1980) (discussing Illinois Central, "the decision established the principle that a state, as administrator of the trust in tidelands on behalf of public, does not have the power to abdicate its role as trustee in favor of private parties").

<sup>30</sup> Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892), available at <http://supreme.justia.com/us/146/387/>.

<sup>31</sup> R.I. Const. art. I, § 17 (West 2011), available at <http://www.rilin.state.ri.us/RiConstitution/C01.html>. See also Champlin's Realty Assoc. v. Tillson, 823 A.2d 1162, 1166 (R.I. Sup. Ct. 2003).

<sup>32</sup> See Shively v. Bowlby, 152 U.S. 1, 11 (1894), available at <http://supreme.justia.com/us/152/1/case.html>.

<sup>33</sup> See R.I. Const. art. I, § 17 (West 2011), available at <http://www.rilin.state.ri.us/RiConstitution/C01.html>.

<sup>34</sup> R.I. Gen. Laws § 46-5-1.2(a) (West 2011), available at <http://www.rilin.state.ri.us/Statutes/TITLE46/46-5/46-5-1.2.HTM>.

<sup>35</sup> R.I. Gen. Laws § 46-5-1.2(b) (West 2011), available at <http://www.rilin.state.ri.us/Statutes/TITLE46/46-5/46-5-1.2.HTM>.



The General Assembly has generally delegated all the regulatory responsibility over coastal resources to CRMC.<sup>37</sup> This delegation makes CRMC the administrator of Rhode Island’s public trust waters.<sup>38</sup> Thus, the agency serves as the “principle mechanism for management of the state’s coastal resources.”<sup>39</sup> One exception to CRMC’s “exclusive jurisdiction”<sup>40</sup> over coastal resources is that the General Assembly specifically delegated the mooring licensing authority to certain harbor cities.<sup>41</sup> Accordingly, Newport has been delegated the power to determine the number, placement, and use of permanent and temporary moorings, the assignment and removal of moorings, minimum mooring specifications, and fees.<sup>42</sup> Newport exercises this power through the city ordinances and enforcement by the harbormaster. Just as the CRMC’s enabling statute placed the agency in “the role of public trustee for the state’s coastal resources,”<sup>43</sup> Newport is required to comply with the PTD when administering its mooring ordinances.<sup>44</sup>

Because CRMC retains jurisdiction over non-mooring aspects of Newport Harbor, the interaction between the two government entities is important. CRMC’s governance overlaps with Newport’s in two respects: (1) the requirement of CRMC approval for Harbor Management Plans, and (2) jurisdiction over permits that include moorings plus other uses, activities, or structures that are outside the scope Newport’s jurisdiction. The City of Newport is therefore required to have a CRMC-approved Municipal Harbor Management Plan in order to ensure

---

<sup>36</sup> R.I. Gen. Laws § 46-5-1.2(b) (West 2011), *available at* <http://www.rilin.state.ri.us/Statutes/TITLE46/46-5/46-5-1.2.HTM>.

<sup>37</sup> R.I. Gen. Laws § 46-23-6 (West 2011), *available at* <http://www.rilin.state.ri.us/Statutes/Title46/46-23/46-23-6.HTM>

<sup>38</sup> Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island’s Shore*, 24 Suffolk U. L. Rev. 313, 323-324 (1990) (explaining that CRMC “clearly assumed the role of public trustee for the state’s coastal resources”).

<sup>39</sup> Coastal Resources Management Council, Ocean Special Area Management Plan § 1020.1(3) (October 19, 2010), *available at* [http://www.crmc.ri.gov/samp\\_ocean/finalapproved/RI\\_Ocean\\_SAMP.pdf](http://www.crmc.ri.gov/samp_ocean/finalapproved/RI_Ocean_SAMP.pdf).

<sup>40</sup> Coastal Resources Management Council, Ocean Special Area Management Plan 1020.1 (3) (October 19, 2010), *available at* [http://www.crmc.ri.gov/samp\\_ocean/finalapproved/RI\\_Ocean\\_SAMP.pdf](http://www.crmc.ri.gov/samp_ocean/finalapproved/RI_Ocean_SAMP.pdf).

<sup>41</sup> *See, e.g.* R.I. Gen. Laws § 46-4-6.6 (West 2011) (Newport), *available at* <http://www.rilin.state.ri.us/Statutes/TITLE46/46-4/46-4-6.6.HTM>.

<sup>42</sup> *Id.*

<sup>43</sup> Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island’s Shore*, 24 Suffolk. U. L. Rev. 313, 321 (1999).

<sup>44</sup> *See The Public Trust Doctrine, Striking a Balance Between Public and Private Rights in the Shore*, pg. 12. (June 4, 1999, Roger Williams University Ralph R. Papitto School of Law, Bristol, RI) (“A state may still delegate to local governments the responsibility and authority for administering Trust resources. Such delegations may take the form of local shoreland zoning, and port and harbor management.”). *See also Champlain’s Reality Assoc. v. Tillson*, 2001 WL 770810, at \*5 (R.I. Super. Ct. 2001).

compatibility with the Coastal Resources Management Program (a.k.a. the “Red Book”).<sup>45</sup> CRMC has emphasized this by expressing that the harbor cities’ power is limited by the agency’s approval of the location of the proposed mooring permitting areas.<sup>46</sup> The plan approval program was developed to facilitate the positive interaction of municipalities with the CRMC: “[w]hile the primary responsibility for developing and implementing harbor management remains at the local level, regulations to ensure that actions taken by the municipalities are consistent with the overriding management programs are reserved by the state.”<sup>47</sup> The CRMC’s April 2010 approval of the City of Newport’s Comprehensive Harbor Management Plan (Harbor Plan) indicates that Newport’s mooring scheme is in compliance with CRMC’s regulations and consistent with its purposes.

When permittees seek approval for projects that involve both moorings and CRMC-regulated elements, CRMC retains jurisdiction over the entire project and Newport loses authority over those moorings.<sup>48</sup> For example, an operation that includes moorings plus docks, floats, and/or a floating business would be outside of Newport’s jurisdiction.<sup>49</sup> If the permits for the elements under exclusive CRMC jurisdiction were denied, however, Newport would resume jurisdiction over the remaining moorings.<sup>50</sup> Due to these intersections with CRMC jurisdiction, Newport has exclusive jurisdiction over moorings only under two conditions: (1) it is acting pursuant to a CRMC-approved Harbor Plan, and (2) the applicant seeks a mooring only.

In order to best exercise the power to issue mooring permits, the Newport City Council has created the Commission, which serves to “recommend areas to be designated for anchorages and moorings, as well as suggested rules and regulations governing the placement and administration of assigned moorings.”<sup>51</sup> The Newport City Council considers the Commission’s recommendations in enacting Harbor Rules and Regulations by city ordinance.<sup>52</sup>

---

<sup>45</sup> Coastal Resources Management Council, Rhode Island Coastal Resources Management Program § 300.15 (December, 2010), available at <http://www.crmc.ri.gov/regulations/RICRMP.pdf> (The Red Book).

<sup>46</sup> Coastal Resources Management Council, Management Procedures for Siting Mooring Areas, pg. 1 (May 20, 2006), available at [http://www.crmc.ri.gov/regulations/Mooring\\_Fields\\_Siting.pdf](http://www.crmc.ri.gov/regulations/Mooring_Fields_Siting.pdf).

<sup>47</sup> R.I. Admin. Code 16-1-13-B (West 2010).

<sup>48</sup> Miner v. Newport, 1988 WL 1017203, \*3 (R.I. Super. Ct. 1988) (a.k.a. Bolender case).

<sup>49</sup> Id.

<sup>50</sup> See Miner, Id. at 5 (R.I. Super. Ct. 1988).

<sup>51</sup> Newport Code of Ordinances 2.88.030(D), available at [http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode Island](http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode%20Island).

<sup>52</sup> Id. at 12.28.130.

Therefore, Newport generally enjoys autonomy from the federal government in its harbor management responsibilities, but remains subject to CRMC's oversight of the Newport's Harbor Management Plan. While the General Assembly specifically delegated Newport the power to regulate moorings, this authority is subject to the statutory requirement of PTD compatibility. Newport's administration of its mooring scheme is also guided by Illinois Central, the United States Supreme Court's articulation of the minimum requirements for public trust administrators. Under Illinois Central, Newport may issue mooring permits only if it retains regulatory control and determines that the permits either advance a public trust interest or have a minimal negative impact on the general public's right to use public trust waters.<sup>53</sup>

#### **Note: Federal Role**

While Newport and CRMC share significant regulatory authority over moorings, there are several federal restrictions on that authority. First, because mooring equipment are permanent "structures" in navigable water under the Rivers and Harbors Act<sup>54</sup>, the state must act pursuant to its General Permit from the United States Army Corps of Engineers (Army Corps).<sup>55</sup>

Second, moorings that are within "federal project areas"<sup>56</sup> may be subject to Army Corps' guidance policies. However, Newport is seeking to redefine the boundaries of the federal project areas.<sup>57</sup>

Third, state and local regulatory power is subject to the federal navigational servitude. The navigational servitude is defined as "an aspect of the sovereignty of the United States, grounded in the power of the Federal Government to regulate commerce, entitling the government to exert a dominant servitude in all lands below the ordinary high water mark of

---

<sup>53</sup> See Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892), available at <http://supreme.justia.com/us/146/387/>.

<sup>54</sup> 33 C.F.R. § 322.3(a) (West 2011) ("DA permits are required under section 10 for structures and/or work in or affecting navigable waters of the United States"), available at <http://law.justia.com/cfr/title33/33-3.0.1.1.28.0.10.3.html>; 33 C.F.R. § 322.2(b) (West 2011), available at <http://cfr.vlex.com/vid/322-2-definitions-19766543> (The term structure shall include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction). These regulations are enacted pursuant to the Army Corps' authority to promulgate 33 U.S.C.A. § 403, available at <http://www.law.cornell.edu/uscode/33/403.html>.

<sup>55</sup> Department of the Army, Programmatic General Permit, State of Rhode Island, General Permit No. NAE-2006-2711 (February 13, 2007), available at [http://www.nae.usace.army.mil/reg/Permits/RI\\_PGP.pdf](http://www.nae.usace.army.mil/reg/Permits/RI_PGP.pdf).

<sup>56</sup> Map No. 3 in the Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan (April 2010).

navigable streams.”<sup>58</sup> This means the federal government has a paramount interest in protecting interstate travel and business. If commerce is being impaired in state waters, the federal government will override the usual policy of giving local authorities autonomy over harbor management and step in to protect commerce. The superior power vested in the navigational servitude gives the federal government authority to make laws pre-empting any interfering state or local regulation. The United States Supreme Court may also overrule any state court decision deemed inconsistent with the federal navigational servitude. While the Harbor Plan does indicate that the moorings may have some effect on navigation, this issue is beyond the scope of this report.<sup>59</sup>

Finally, parts of Newport Harbor are currently designated federal “anchorage grounds”<sup>60</sup> and federal “special anchorage areas.”<sup>61</sup> These areas are subject to Coast Guard regulations unrelated to the mooring issues discussed in this report.<sup>62</sup>

### **III. Statutory Compliance of Newport’s Mooring Regulations**

In administering its mooring regulations, Newport is subject to both federal and state statutes. The Rivers and Harbors Act applies to Newport’s moorings through its grant of authority to Army Corps to issue General Permits to harbor municipalities. Under Rhode Island

---

<sup>57</sup> Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, pg. 101 (April 2010).

<sup>58</sup> 78 Am. Jur. 2d Waters §137 (West 2010).

<sup>59</sup> For example, the issue of moorings experiencing vessel drifting over the federal navigation channel is mentioned on page 102 of the Harbor Management Plan.

<sup>60</sup> Federal Anchorage D is located west of Goat Island and lying between Rose Island to its north and Ft. Adams to its south. Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, pg. 101 (April 2010). Federal Anchorage E is located north of the Point Mooring Area going north to the southerly shore of Coasters Harbor Island. HMP pg. 105. The official coordinate descriptions are set forth at 33 C.F.R. § 110.145, available at <http://cfr.vlex.com/vid/110-145-narragansett-bay-19758708>.

<sup>61</sup> Area No.1 is in Brenton Cove. Area No. 2 is east of Goat Island. Area No. 3 is north of the Goat Island Causeway Bridge beginning at the Newport Harbor Light following the southerly boundary of Anchorage E to the shoreline, south along the shoreline to the east foot of the Goat Island Causeway Bridge, west following the Goat Island Causeway Bridge to the shoreline of Goat Island, north following the east shore of Goat Island to the point of beginning. 33 C.F.R. § 110.46 (West 2011), available at <http://cfr.vlex.com/vid/110-46-newport-harbor-19758249>.

<sup>62</sup> For the Coast Guard regulations regarding boat traffic in anchorage grounds, see 33 C.F.R. § 109.05, available at <http://cfr.vlex.com/vid/109-05-anchorage-grounds-19757933>. For the Coast Guard regulations regarding boat traffic in these special anchorage areas, see 33 C.F.R. § 109.10, available at <http://cfr.vlex.com/vid/109-10-special-anchorage-areas-19757949>.

law, municipalities must also meet the PTD compatibility requirement explained in subsection B, below.

### **A. Compliance with Rhode Island’s Army Corps General Permit**

Federal law requires a permit from the Army Corps to place any physical structure, including mooring tackle, in navigable waters.<sup>63</sup> Rhode Island municipalities have Army Corps’ permission to allow private parties to place mooring equipment within their jurisdiction, subject to the conditions provided in Rhode Island General Permit.<sup>64</sup> The Permit expressly allows “private, non-commercial, non-rental, single-boat moorings” that are cited pursuant to a CRMC-approved Harbor Plan.<sup>65</sup> The general permit requires Army Corps approval for any moorings that do meet that description.<sup>66</sup>

Unless the area is de-authorized, it may be advisable to recognize Army Corps jurisdiction in Newport’s ordinance. This could be accomplished by indicating that Newport’s commercial mooring permits are subject to Army Corps approval. Sample language can be found in Jamestown’s ordinance: “New applicants for commercial mooring permits in harbor waters must be approved by the [CRMC], the Army Corps of Engineers, and the harbor commission.”<sup>67</sup>

### **B. The PTD Compatibility Requirement**

As discussed in Section II, the 2000 General Assembly set forth two different standards for state disposition and leasing of public trust resources. R.I. Gen. Laws § 46-5-1.2 has two important provisions:

---

<sup>63</sup> 33 C.F.R. § 322.2(b) (West 2011), *available at* <http://cfr.vlex.com/vid/322-2-definitions-19766543>.

<sup>64</sup> Department of the Army, Programmatic General Permit, State of Rhode Island, General Permit No. NAE-2006-2711 (February 13, 2007), *available at* [http://www.nae.usace.army.mil/reg/Permits/RI\\_PGP.pdf](http://www.nae.usace.army.mil/reg/Permits/RI_PGP.pdf).

<sup>65</sup> *Id.* See also, Maine Harbormasters Association, Harbor Management, *A Legal Guide for Harbormasters and Coastal Officials*, *available at* <http://www.maineharbormasters.org/Harbor%20Management.htm> (Maine’s general permit has the same restriction, leading the MHA report to conclude: “rental moorings are not included under the permit. As a result, marina operators and others who plan to lease moorings must obtain a permit from the Corps.”)

<sup>66</sup> Department of the Army, Programmatic General Permit, State of Rhode Island, General Permit No. NAE-2006-2711 (February 13, 2007), *available at* [http://www.nae.usace.army.mil/reg/Permits/RI\\_PGP.pdf](http://www.nae.usace.army.mil/reg/Permits/RI_PGP.pdf).

<sup>67</sup> Jamestown Code of Ordinances, Ch. 78, Art. II, Div. 4, Sec. 6(e), *available at* [http://www.jamestownri.net/harbor/HMO/Harbor\\_Ordinance\\_2004.pdf](http://www.jamestownri.net/harbor/HMO/Harbor_Ordinance_2004.pdf).

(a) Before absolute title to public trust waters may be transferred to private parties, the General Assembly must first make a PTD compatibility determination.<sup>68</sup>

(b) When a more limited property interest is involved (i.e. a lease), the statute still requires a PTD compatibility determination, but provides that the duty to make the determination may be delegated to another government entity.<sup>69</sup>

The first standard requires a PTD compatibility determination by the General Assembly itself. The General Assembly has made a PTD compatibility determination for “recreational mooring areas.”<sup>70</sup> The General Assembly left CRMC the responsibility of further defining approved “recreational moorings.”<sup>71</sup> CRMC in turn defined “recreational moorings areas” as “any designated area managed by a commercial enterprise, a club, a city, or town, where five (5) or more recreational craft are kept at moorings.”<sup>72</sup> Newport’s private mooring areas fall within the category definition as moorings managed by a city. The city’s commercial moorings also appear to meet the scope of the legislative consistency determination as moorings “managed by a commercial enterprise,” but remain subject to the Newport’s regulatory authority.

Under the second provision, applicable to leases, the PTD compatibility determination may be made by either the legislature or by the appropriate government delegate. However, the General Assembly has not addressed whether CRMC or Newport is the delegate in this situation. While it is clear that CRMC is *generally* the agency to which the administration of public trust waters has been designated,<sup>73</sup> administration of moorings in particular has been delegated to Newport.<sup>74</sup> It is unclear whether (a) the delegation of mooring authority also delegates the PTD compatibility determination to Newport, or (b) CRMC’s more general public trust delegation controls.

Under the former interpretation, Newport has the responsibility of deciding whether the mooring scheme is consistent with the PTD. This decision would be informed by Illinois Central. The analysis of the mooring scheme under the principles of Illinois Central is explored

---

<sup>68</sup> R.I. Gen. Laws § 46-5-1.2(a), available at <http://www.rilin.state.ri.us/Statutes/TITLE46/46-5/46-5-1.2.HTM>.

<sup>69</sup> R.I. Gen. Laws § 46-5-1.2(b), available at <http://www.rilin.state.ri.us/Statutes/TITLE46/46-5/46-5-1.2.HTM>.

<sup>70</sup> R.I. Gen. Laws § 46-23-6, available at <http://www.rilin.state.ri.us/Statutes/Title46/46-23/46-23-6.HTM>

<sup>71</sup> Id.

<sup>72</sup> Coastal Resources Management Council, Rhode Island Coastal Resources Management Program § 300.4 (December, 2010), available at <http://www.crmc.ri.gov/regulations/RICRMP.pdf> (The Red Book).

<sup>73</sup> R.I. Gen. Laws § 46-23-6, , available at <http://www.rilin.state.ri.us/Statutes/Title46/46-23/46-23-6.HTM>

in section IV of this report. The latter interpretation may be more consistent with CRMC's views. The CRMC's has articulated its position that municipalities empowered by statute to regulate moorings are not "specifically empowered to consider environmental impacts of activists, prevention of conflicts with other water dependent uses, or to decide *resource allocation questions*" (emphasis supplied).<sup>75</sup> Because a PTD compatibility determination requires balancing the benefit of moorings with other public use interests, it might be construed as a "resource allocation question" outside Newport's scope of authority.

There are two indications that CRMC has made or would make the requisite compatibility determination with regard to Newport's private and commercial moorings. When CRMC defined "recreational mooring area" for purposes of delineating the scope of the legislature's categorical PTD compatibility determination, it specifically contemplated moorings managed by the city (private moorings) and those managed by a commercial enterprise (commercial moorings). CRMC's approval of Newport's HMP may also be construed as a manifestation of CRMC's views on the PTD compatibility issue. Assuming that the CRMC acted pursuant to its "role of public trustee for the state's coastal resources,"<sup>76</sup> the agency would not have approved any provisions of the HMP that the agency deemed inconsistent with the PTD.

#### **IV. Public Trust Doctrine Applied to Newport's Mooring Regulations**

The application of the PTD to Newport's mooring scheme includes two important inquiries under Illinois Central: (A) the nature of the interest conveyed to the mooring holder and the nature of the regulatory power retained by the city, and (B) whether the private moorings are in the public interest or have a minimalistic effect on that interest, discussed in turn below in subsections A and B, respectively.

##### **A. The Nature of the Property Interest Conveyed by a Mooring Permit**

In examining the nature of the property interest conveyed by a Newport mooring permit, this section provides three ways to assess property rights. The first inquiry is the conveyance of the right to exclude others. The public trust significance of this inquiry is the degree to which

---

<sup>74</sup> R.I. Gen. Laws § 46-4-6.6, available at <http://www.rilin.state.ri.us/Statutes/TITLE46/46-4/46-4-6.6.HTM>.

<sup>75</sup> R.I. Admin. Code 16-1-13-B (West 2010).

<sup>76</sup> Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 Suffolk. U. L. Rev. 313, 321 (1999).

moorings interfere with non-permittees' use and enjoyment of public trust waters. The second question centers around the revocability of the property interest. The final aspect of the property interest analysis is the issue of mooring alienability (i.e. the right to dispose of the property right by sale or deed). The public trust significance of the latter two inquiries depends on the inverse relationship between the scope of the property interest conveyed and the scope of the management authority the City retained.

Before this analysis, it is important to note the distinctions between commercial moorings and private moorings under Newport's ordinances. These differences inform the characterization of the property interests involved. Private moorings are designated for use by the boat registered to that mooring.<sup>77</sup> Commercial moorings are defined in the Newport mooring ordinance as "any mooring which does not meet the definition of a private mooring."<sup>78</sup>

The most significant difference between private and commercial moorings is that commercial moorings may be rented to third parties. In fact, that is their primary purpose. In contrast, the private mooring lessee is strictly forbidden from subleasing the mooring space.<sup>79</sup> In fact, an attempt to do so will result in forfeiture of the license.<sup>80</sup> Newport's policy is to place heavy restrictions on use by vessels not registered to the mooring in order to ensure that the private moorings are not being unlawfully used in a commercial manner for rental profit. Therefore, while the private lessee may allow another vessel to occupy the mooring space for up to 7 days at a time not exceeding 14 total days per year, such use must be (a) approved by the harbormaster in writing, and (b) not be compensated, *i.e.* not produce profit for the mooring holder.<sup>81</sup> The other circumstance in which a non-registered boat could occupy the mooring space is by rafting.<sup>82</sup> The limitations on the use of rafting in the Newport ordinances is that (a) it shall "not interfere with adjacent single moorings or anchorages," (b) the rafted boat needs to be manned at all times,<sup>83</sup> and (c) the lessee cannot receive compensation from the rafted boat.<sup>84</sup>

---

<sup>77</sup> Newport Code of Ordinances 12.28.130(C)(2)(g); 12.28.130(D)(3), *available at* [http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode Island](http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode%20Island).

<sup>78</sup> *Id.* at 12.28.130(B)(8).

<sup>79</sup> *Id.* at 12.28.130(F)(4).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 12.28.130(F)(4) and 12.28.130(D)(3).

<sup>82</sup> *Id.* at 12.28.130(M).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 12.28.130(D)(3).



With regard to commercial moorings, however, Newport retains relatively less regulatory control.

### **1. Right to Exclude**

The right to exclude others has been described as the most important right in the bundle of property rights.<sup>85</sup> Newport's mooring permits give the permittee the right and perhaps even the responsibility to exclude other boats from using the mooring space registered to them. Because this results in the exclusion of the general public from mooring areas, the property interest in exclusion directly relates to the Illinois Central inquiry into the degree that the property interest conveyed interferes with the general public's use and enjoyment of public trust waters. That question is explored further in subsection B below.

### **2. License Revocability**

Mooring permits are subject to regulatory conditions that warrant revocation. These include aspects of the Newport mooring ordinance such as a valid Rhode Island boat registration, mooring tackle specifications, boat size limits, and the registration sticker system. Because the mooring license is revocable if the licensee fails to comply with any of these conditions, the right to use and possess the mooring space is not absolute. In this respect, the mooring permits more closely resemble a preferred right to access the water than a vested property interest. CRMC explicitly recognized the license nature of all mooring permits, clarifying that any activities carried out pursuant to approved Harbor Management Plans "shall be considered to be acting under license from the State of Rhode Island."<sup>86</sup>

A revocable license is in stark contrast to the conveyance condemned in Illinois Central.<sup>87</sup> That case involved a transfer of absolute title in fee simple to a private party. In contrast, Newport's mooring scheme conveys a revocable license. The United States Supreme Court has made this distinction between impermissible fee simple transfers and the permissible revocable licenses in the dock permit context.<sup>88</sup>

---

<sup>85</sup> 63C Am. Jur. 2d Property § 1 (West 2011) (The right to exclude others, as well as their property, is one of the most essential sticks in the bundle of rights that are commonly characterized as property.)

<sup>86</sup> R.I. Admin. Code 16-1-13-B (West 2010).

<sup>87</sup> See Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 455 (1892), available at <http://supreme.justia.com/us/146/387/>.

<sup>88</sup> Id.

The public trust significance of limiting the scope of a licensee's property interest arises from the relationship between rights conveyed and management responsibilities retained. This retention of management responsibility is a key requirement under Illinois Central. Private moorings are more consistent with Illinois Central due to the additional regulatory restrictions on the use of the mooring by unregistered boats. In this respect, Newport retains more control over private moorings than over commercial mooring. Therefore, private moorings, having more restrictions, receive a more circumscribed property interest than do commercial moorings.

In addition to limiting the scope of the property interest for public trust purposes, revocability has legal significance under the Takings Clause of the Fifth Amendment,<sup>89</sup> as incorporated against the states under the Fourteenth Amendment.<sup>90</sup> The Takings Clause requires the state to compensate a private property interest holder if the state either takes away, physically intrudes on, or enacts regulations render the property interest economically valueless.<sup>91</sup> But with regard to Newport's mooring, a licensee is put on notice that his or her license is revocable. Thus, if a private or commercial license is revoked, the City does not have to compensate the permit holder, because the permittee never had a reasonable expectation of continued use in the first place. The Court of Appeals for the Eleventh Circuit has explained that "permits to perform activities on public land...are mere licenses whose revocation cannot rise to the level of a 5<sup>th</sup> amendment taking."<sup>92</sup> This conclusion would apply with equal force to licenses to use public trust water.

### 3. Alienability

Alienability of a property interest refers to the right to dispose, which means the ability of the owner to sell or deed the property interest.<sup>93</sup> In Newport, the right to dispose of *private* moorings is limited to a transfer to a family member.<sup>94</sup> In the case of moorings registered to a

---

<sup>89</sup> U.S. Const. amend. V, available at <http://topics.law.cornell.edu/constitution/billofrights#amendmentv>

<sup>90</sup> See, e.g. Missouri v. Nebraska, 196 U.S. 23 (1904), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=196&invol=23>.

<sup>91</sup> See, e.g. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), available at <http://www.law.cornell.edu/supct/html/91-453.ZS.html>.

<sup>92</sup> Marine One v. Manatee County, 898 F.2d 1490, 1492-1493 (11<sup>th</sup> Circ. 1990), available at <http://ftp.resource.org/courts.gov/c/F2/898/898.F2d.1490.87-3656.html>.

<sup>93</sup> See 63C Am. Jur. 2d Property § 35 (West 2011) ("One of the principal and most important rights incident to ownership is alienability, or the right to disposition.")

<sup>94</sup> Newport Code of Ordinances 12.28.130(D)(2), available at [http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode Island](http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode%20Island). As of the date of this report, the Newport ordinance did not limit the number of transfers between family members. One of the goals

natural person, this limitation is easily enforced. With respect to private moorings registered to partnerships, LLCs, or corporations, however, application of the transfer limit provision is less straight-forward. Under a strict interpretation, business entities may never transfer private moorings because they do not have any family members. While the partners, members, or shareholders no doubt have family members, the business entity is recognized as a legally separate property owner.<sup>95</sup> This means that the property of the business entity, the mooring permit in this case, is not the property of the natural persons that belong to that business organization. This strict construction is consistent with business organization law, which punishes natural person representatives who disregard business formality by treating business assets as their own.<sup>96</sup>

With regard to commercial moorings, the ordinances do not explicitly prohibit transferring the mooring by deed or sale. While the ordinance's intent to allow renting out commercial moorings is clear, the ordinance thus leaves the question of alienability unanswered.

Furthermore, because of the concept of separate legal identity, both private and commercial moorings held by business associations may change natural person ownership without any "transfer" action. Because LLCs and corporations can change ownership hands without any alteration to its business identity,<sup>97</sup> one interpretation of the ordinance is that moorings could be transferred between private parties into perpetuity.

The public trust significance of alienability is that it results in transfer of a much broader property interest. As noted in subsection 2, the broader the property interest conveyed, the less regulatory authority the City of Newport has retained. Therefore, commercial moorings, without further limits introduced into the ordinance revision, are less consistent with the principles of Illinois Central.

### **Ordinance Recommendation: Clarifying the Property Interest Conveyed**

---

of ordinance review is to revise the ordinance to comply with CRMC guidelines stipulating only one transfer. Personal Communication with Hank Kniskern (E-mail received April 27<sup>th</sup>, 2010).

<sup>95</sup> See, generally, NTS Am. Jur. 2d Limited Liability Companies § 1 (West 2011), 59A Am. Jur. 2d Partnership § 246 (West 2011), 18 Am. Jur. 2d Corporations § 44 (West 2011).

<sup>96</sup> 18 Am. Jur. 2d Corporations § 46 (West 2011).

<sup>97</sup> See Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U.S. 206, 216 (1908), citing Donnell v. Herring-Hall-Marvin Safe Co., 208 U.S. 267, 273 (1908) ("a corporation remains unchanged and unaffected in its identity by changes in its members"). These cases are available at <http://supreme.justia.com/us/210/206/> and <http://supreme.justia.com/us/208/267/case.html>, respectively.

Like any property license, Newport's mooring permits "can be revoked at the pleasure of the licensor, regardless of how long the use has been permitted."<sup>98</sup> Because mooring permits are often renewed across a long period of time, it may be beneficial to highlight the notion of revocability despite the length of time one holds a permit. While permittees do not have an absolute legal right of ownership, the length of time one holds a permit does increase the permittee's expectation that the right will not be forfeited. The tension created by such expectations might be eased by further clarification in the ordinance or within the documents issued to mooring applicants and permittees.

Thus, it may be beneficial to add a clarification that the mooring permit does not (a) carry absolute property rights, (b) provide for a term longer than one year, and (c) is revocable if the harbormaster reasonably finds a violation. In Maine, for example, "recent amendments clarify that a grant of the privilege to set a mooring does not carry with it any property rights to state owned submerged lands occupied by the mooring."<sup>99</sup> The Maine Harbormasters Association's Harbor Management Guide explains that the amendments "should bar claims that the state has in any way conveyed away public trust lands."<sup>100</sup> This could also bar claims against the city for any damages related to a forfeiture decision based on takings claims explained in section IV(A)(2) of this report.

Newport may also benefit from adopting the Massachusetts term "temporary mooring," which is used in the state's legislation to describe its mooring permits, defining temporary as "no longer than to the end of any given calendar year."<sup>101</sup> This phraseology emphasizes the fact that the mooring permit holder does not have any vested property interest in the mooring beyond one year.

## **B. Compatibility of Moorings with the Public's Interest**

The second issue arising under Illinois Central is whether the moorings are consistent with the purposes of the PTD. The PTD is satisfied if the property interest transferred (a) is in

---

<sup>98</sup> 53 C.J.S. Licenses § 43 (West 2010).

<sup>99</sup> Maine Harbormasters Association, Harbor Management, *A Legal Guide for Harbormasters and Coastal Officials*, available at <http://www.maineharbormasters.org/Harbor%20Management.htm> (discussing 38 M.R.S.A. § 3, available at <http://www.mainelegislature.org/legis/statutes/38/title38sec3.html>).

<sup>100</sup> Id.

<sup>101</sup> M.G.L.A. 91 § 10A (West 2011), available at <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXIV/Chapter91/Section10A>.

furtherance of the public interest, or (b) has a minimal impact on the public's use of the resource.<sup>102</sup> But which government unit decides this? Because Illinois Central does not answer the question, the matter is left entirely to state law.

Under the statute codifying the public trust doctrine in Rhode Island, the General Assembly must make the decision about whether an *absolute* ownership interest may be transferred to a private party.<sup>103</sup> Some other states have also vested their legislative branches with the power and duty to administer public trust waters.<sup>104</sup> On the other hand, some states have deemed it poor policy to leave the PTD in the hands of the legislature. One court went so far as to conclude: “[w]e find the concept of stewardship inconsistent with the function of the Legislature.”<sup>105</sup> The concern is that legislatures act too broadly by declaring that an entire category of uses is consistent with the public trust doctrine, without regard to the important local variables. While legislative sessions focus on general policies, case-by-case adjudication looks at the facts underlying the particular property interest and its impact on public trust uses. The degree of impact of permitted activities on public trust uses varies based on the time, place, and the manner of those existing and proposed uses.

Under Rhode Island's public trust law, either the legislative branch or the relevant delegate determines whether a transfer of a limited property interest (i.e. a license) is consistent with the PTD. As explained in Section III in this report, there is a question as to whether the relevant delegate for mooring PTD compatibility determinations is CRMC or the Commission. Some states have delegated public trust administration to administrative agencies<sup>106</sup> like CRMC, while other states have delegated the responsibility to local government units,<sup>107</sup> like the

---

<sup>102</sup> Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892), *available at* <http://supreme.justia.com/us/146/387/>.

<sup>103</sup> R.I. Gen. Laws § 46-5-1.2(a), *available at* <http://www.rilin.state.ri.us/Statutes/TITLE46/46-5/46-5-1.2.HTM>.

<sup>104</sup> *See, e.g., County of Orange v. Heim*, 30 Cal.App.3d 694, 707 (1973), *citing The People v. California Fish Co.* (“It is the Legislature that administers the trust, and it is within the province of the Legislature to prefer one trust use over another”); *State v. Bleck*, 338 N.W.2d 492, 498 (Wis. 1983) (“it is the legislature's function to weigh all relevant policy factors to obtain the fullest public use of such waters and to provide for the convenience of riparian owners”).

<sup>105</sup> Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Com'n, 719 So.2d 119 (La. App. 1998), *available at* [http://scholar.google.com/scholar\\_case?case=7179292524731028859&q=719+So.2d+119+&hl=en&as\\_sdt=2,40](http://scholar.google.com/scholar_case?case=7179292524731028859&q=719+So.2d+119+&hl=en&as_sdt=2,40).

<sup>106</sup> Com. by Shapp v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 596 (Pa. 1973) (The ‘natural, scenic, historic and aesthetic values of the environment’ are the trust Res; the Commonwealth, through its executive branch, is the trustee; the People of this Commonwealth are the trust beneficiaries), *available at* [http://scholar.google.com/scholar\\_case?case=3708333227758765777&q=311+A.2d+588&hl=en&as\\_sdt=2,40](http://scholar.google.com/scholar_case?case=3708333227758765777&q=311+A.2d+588&hl=en&as_sdt=2,40).

<sup>107</sup> Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources, 271 N.W.2d 69 (Wis. 1978) (“Legislature may legitimately delegate authority to local units of government to act in matters involving the state's

Commission. Without deciding where the delegation lies in Rhode Island, the information in this section is intended to inform the Commission's own consideration of PTD compatibility.

### **1. In Furtherance of the "Public Interest"?**

The "public interest" language used in Illinois Central is different from the usual pronouncement that the state holds title in trust for the "public use." However, the Supreme Court did not further explain what it meant by "public interest." One interpretation is that it is a restatement of the purpose of the trust for preserving traditional public uses. The other interpretation depends on a broader understanding of the public's interests, which extends beyond actual use of public trust waters.

#### **a. Traditional Public Trust Uses**

The PTD traditionally protects navigation, commerce, and fishing.<sup>108</sup> It is clear that the PTD is violated if a property interest transferred to a private party results in substantial interference with the general public's ability to use the resource for those purposes. But it is not clear from Illinois Central the degree to which any transfer should go beyond non-interference and actually further the public's use of the area.

Moorings enhance enjoyment for certain boat-owners. Moorings allow permittees to access the water more conveniently than access by public boat ramp. Some permittees use the moored vessel for recreational fishing. The commercial moorings are a source of revenue for commercial lessees. For non-permittees, however, moorings do not further actual use for the general public. Neither do Newport moorings further the additional Rhode Island Constitution guarantees of gathering of seaweed, leaving the shore to swim in the area, and passage along the shore.<sup>109</sup> However, none of these benefits to traditional public trust uses are shared by the public as a whole.

It is uncertain under the PTD whether the mooring system is benefiting enough of the general public to be considered as promoting public trust uses. However, any project designed for the general public will necessarily exclude some people at the same time. For example, a

---

"public trust" duties provided that the delegation is in furtherance of the trust and will not block the advancement of paramount interests"), *available at*

[http://scholar.google.com/scholar\\_case?case=2705054096608551323&q=271+N.W.2d+69+&hl=en&as\\_sdt=2,40](http://scholar.google.com/scholar_case?case=2705054096608551323&q=271+N.W.2d+69+&hl=en&as_sdt=2,40).

<sup>108</sup> See Shively v. Bowlby, 152 U.S. 1, 11 (1894), *available at* <http://supreme.justia.com/us/152/1/case.html>.

public beach will accommodate visitors from the general public, but the number could be limited in order to provide for a safe visitor-to-lifeguard ratio without offending the PTD. The Supreme Court of California provided another example when it upheld one municipality's decision lease tidal areas to a packing, processing, and shipping warehouse, calling it a "public use in furtherance of the trust for navigation and commerce."<sup>110</sup> The fact that the plant would not accommodate every member of the public did not prevent a finding that it provided for overall promotion of traditional public trust uses.

Furthermore, while the mooring scheme inevitably enhances the use of certain members of the public to the exclusion of others, the alternative of unregulated moorings is unworkable. Allowing unrestricted mooring would greatly hinder safety and navigation throughout the harbor to the detriment of not some, but all, members of the public. While the system is, like any regulatory scheme, not perfect, Newport strives to reach an equitable balance between the need to limit use and the desire to expand use to more of the general public by using an open public allocation process. The extent to which private use of mooring space to select private parties reduces the area of the harbor usable by general public is discussed in subsection 2 below.

### **b. Broader Public Interest Test**

The inquiry into the more general public interest of moorings considers benefits outside of the traditional public trust purposes. The United States Supreme Court stated that, in addition to the promotion of interstate and international commerce, a state could transfer interests in public trust areas for the purpose of performing international obligations or for "other public purposes."<sup>111</sup> For example, benefits to the public might include "increasing tax revenues" or "[putting] property to a commercial use."<sup>112</sup>

The question of whether the mooring scheme puts public property into private hands for a broader "public use" may be informed by cases dealing with the "public use" test in a different

---

<sup>109</sup> R.I. Const. art. I, § 17 (West 2011), *available at* <http://www.rilin.state.ri.us/RiConstitution/C01.html>.

<sup>110</sup> *Atwood v. Hammond*, 48 P.2d 20, 24-25 (Cal. 1935), *available at* [http://scholar.google.com/scholar\\_case?case=1377038613279570502&q=48+P.2d+20&hl=en&as\\_sdt=2,40](http://scholar.google.com/scholar_case?case=1377038613279570502&q=48+P.2d+20&hl=en&as_sdt=2,40).

<sup>111</sup> *Shively v. Bowlby*, 152 U.S. 1, 48 (1894), *available at* <http://supreme.justia.com/us/152/1/case.html>.

<sup>112</sup> *Natl. Audubon Soc'y v. Sup. Ct. of Alpine County*, 658 P.2d 709, 724 (Cal. 1983), *available at* <http://scocal.stanford.edu/opinion/national-audubon-society-v-superior-court-30644>.

legal context. For example, in an eminent domain context,<sup>113</sup> the Rhode Island Supreme Court explained that there are two categories of appropriate “public uses”: (1) “where the public use is direct and obvious,” and (2) where “the public necessity is so direct and obvious as to imply a public use.”<sup>114</sup>

The first category satisfying the public interest includes uses such as highways, parks, drainage systems, which the public directly uses. In evaluating public interest of a marina and auditorium operation by the Newport Development Authority, the Supreme Court of Rhode Island responded that the facility could not be leased “to private persons to be operated for private purposes and profit.”<sup>115</sup> But the court construed the auditorium as satisfying public purpose, with the limitation that it “must be devoted primarily to a use by or service to the public and not to any private use, unless the latter be merely incidental and reasonably related to the proper public use and be productive of revenue for the public.”<sup>116</sup> While the court thus recognized that a private use may benefit the public by production of tax revenue, it required that the private use be *incidental*. Thus, while the mooring revenues are dedicated to harbor development projects that do benefit the entire public, the wholly private use by mooring permittees is more than *incidental* under this test.<sup>117</sup>

While raising revenue through tourism benefits Newport’s residents, it is not enough under a strict public use test. However, Newport’s mooring scheme may be distinguished from a general revenue raising scheme. The use of the Maritime Enterprise Fund (MEP) ensures that the revenues are expended for specific harbor purposes, including projects that greatly improve the general public’s use of the harbor. The benefits of the MEP are explored further in section VIII of this report.

The “public necessity” category covers uses such as repair and storage facilities that are necessary for the continuance of an established public use such as a railroad. The relevant question is whether moorings are reasonably necessary to facilitate recreational boating. If so,

---

<sup>113</sup> “Eminent Domain” is defined as “The inherent power of a governmental entity to take privately owned property, esp. land, and *convert it to public use*, subject to reasonable compensation for the taking. Black’s Law Dictionary (9<sup>th</sup> ed. 2009)(*emphasis supplied*).

<sup>114</sup> *In re Rhode Island Suburban RY. Co.*, 48 A.591, 592 (R.I. 1901).

<sup>115</sup> *Opinion to the Governor*, 70 A.2d 817, 76 R.I. 365, 372 (R.I. 1950).

<sup>116</sup> *Id.* at 373.

<sup>117</sup> See also *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 781 (Ill. 1976)(the public purpose cannot be “too indirect, intangible and elusive to satisfy the requirement of a public purpose”).



the mooring scheme is consistent with other jurisdictions' use of the PTD to facilitate recreational use of water resources.<sup>118</sup> The Rhode Island Supreme Court explained that uses falling outside these two categories are not "public uses." The court explained that "there are many kinds of business of great benefit to the public" that are not for the "public use."<sup>119</sup>

While the moorings do not fall neatly within the "public use" categories or clearly without it, the inquiry is not a static one. It is important to remember the ever-changing nature of the public use inquiry. The Rhode Island Supreme Court does not give public use a "rigid, unbending, absolute definition," instead highlighting the "ever-changing conditions of our modern society, new advances in the fields of science, new concepts in the scope and function of government and other circumstances."<sup>120</sup> An interest in developing the tourism industry has been recognized by at least some courts. The Supreme Court of Mississippi, for example, held that allowing a development that would benefit commerce and tourism was "consistent with the public trust," stating the private ownership aspect of the development alone did "not negative the comprehensive public purpose."<sup>121</sup>

In summary, the following facts bear most directly on the public use and interest inquiry. Newport's mooring scheme facilitates public trust uses for permittees. The system necessarily limits the number of individuals who can enjoy the use-facilitating permits, but does so by an open public allocation process. Non-permittees benefit from the mooring scheme only inasmuch as the fees are used for harbor projects, the use of which may be enjoyed by a greater segment of the general public.

## **2. Minimal Impact on the Public's Use?**

Another inquiry under Illinois Central is whether the conveyance is so minimal as to not constitute any interference with the public's use.<sup>122</sup> Some jurisdictions have focused this inquiry on the percentage of the resource that is being allocated to private parties. For example, while the Supreme Court of California held that 40% of public trust waters could not be granted to

---

<sup>118</sup> See, e.g., Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 712 (Cal. 1983), citing Marks v. Whitney, 491 P.2d 374 (Cal. 1971) ("the public trust protects environmental and recreational values").

<sup>119</sup> In re Rhode Island Suburban RY. Co., 48 A.591, 592 (R.I. 1901). "Taking" in the quoted text refers to the legal definition: "the government's actual or effective acquisition of private property either by ousting the owner or by destroying the property or severely impairing its utility." Black's Law Dictionary (9<sup>th</sup> ed. 2009).

<sup>120</sup> Romeo v. Cranston Redevelopment Agency, 254 A.2d 426, 431 (R.I. 1969).

<sup>121</sup> Treuting v. Bridge & Park Comm'n. of Biloxi, 199 So.2d. 627, 633 (Miss. 1967).

private parties,<sup>123</sup> a California appellate court found that a grant of 1.6% constituted a “relatively small parcel.”<sup>124</sup> Similarly, the Supreme Court of Wisconsin considered the fact that “the diminution of [the public trust area] will be very small when compared with the whole of [the public trust area].”<sup>125</sup>

In Newport, the permitted moorings are located in designated areas that total 245 acres.<sup>126</sup> The ordinance provides that 25% of mooring permits may be issued as commercial moorings. Correlated to the area, it is useful to think of the commercial mooring as occupying around 60 acres of the Harbor, closing off those 60 acres from public and recreational use. Of course, the relationship between the number of mooring permits and the occupied mooring area is direct, but not proportional. It might be useful to contrast this number with the larger area (1000 acres) stuck down as violating of the public trust doctrine by the US Supreme Court in Illinois Central<sup>127</sup> and the area of the “relatively small parcel[s]” upheld by the California Supreme Court (18 acres in one case<sup>128</sup>; 10.6 in another<sup>129</sup>).

Another way of approaching the issue is to look at the percentage being granted as proxy for impairment of the public’s use of the resource. In other words, some courts look at the percentage in order to aid the ultimate determination of whether the conveyance has impaired the public’s enjoyment of the public trust resource. For example, in evaluating the “impediment to full use of the public trust resource,” the Supreme Court of Idaho looks at the portion of the water body “taken up by docks, moorings or other impediments.” This fact-based inquiry is resolved if “no one of the public uses of [the public trust resource] will be destroyed or greatly impaired.”<sup>130</sup> The survey of Newport Harbor consumers contained in the HMP contains many

---

<sup>122</sup> See Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892), available at <http://supreme.justia.com/us/146/387/>.

<sup>123</sup> Berkeley v. Super. Ct. of Alameda County, 606 P.2d 362, 368 (Cal. 1980) (“The total acreage placed under the board’s jurisdiction under the two acts was 56,400 acres of tideland or 88 square miles of the Bay. Of this, the board conveyed 22,299 acres”).

<sup>124</sup> County of Orange v. Heim, 30 Cal.App.3d 694, 724 (Ct. of App. 1973).

<sup>125</sup> Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957).

<sup>126</sup> The Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, pp. 92-94 (April 2010). Main Harbor: 66 acres. Main Harbor City Mooring: 10 acres. Point Mooring: 36 acres. Spindle Mooring: 23 acres. Brenton Cove Mooring: 110 acres. Total: 245 acres.

<sup>127</sup> R.I. Admin. Code 16-1-13-B (West 2010).

<sup>128</sup> Atwood v. Hammond, 48 P.2d 20 (Cal. 1935), available at [http://scholar.google.com/scholar\\_case?case=1377038613279570502&q=48+P.2d+20&hl=en&as\\_sdt=2,40](http://scholar.google.com/scholar_case?case=1377038613279570502&q=48+P.2d+20&hl=en&as_sdt=2,40).

<sup>129</sup> County of Orange v. Heim, 30 Cal.App.3d 694, 724 (Ct. of App. 1973).

<sup>130</sup> Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957). See also State v. Pub. Serv. Comm’n, 81 N.W.2d 71, 73-74, 275 (Wis. 1957).

comments on Newport's moorings. However, none refer to any interference with fishing, navigation, or any of the other Rhode Island Constitution uses.<sup>131</sup>

## **V. Private: Commercial Mooring Ratio**

CRMC has recognized the need to “balance between commercial and non-commercial uses” in designating moorings.<sup>132</sup> Newport has decided to set its balance between private and commercial moorings at a ratio of 3:1.<sup>133</sup> This restricts the number of commercial moorings to no more than 25% of the total leased moorings.<sup>134</sup>

Despite the 25% limit provided in the ordinance, 32% of the total moorings in Newport are currently registered as commercial.<sup>135</sup> This figure does not include any private moorings that are being misused as rental moorings, but Newport has made prevention of such use a priority for the harbor.<sup>136</sup> The harbormaster works to enjoin licensees of private moorings from unlawfully sub-leasing. This protects Newport from being deprived of increased fee revenue and from distortion of the ordinance's commercial/private ratio.

The current ordinance also has a provision that allows private mooring lessees to apply for re-designation as a commercial mooring.<sup>137</sup> Newport should consider how this will alter the ratio. For example, it might be prudent to add a clarification in the ordinance that such application can be made only at such time as the commercial mooring percentage is reduced below 25%. The ordinance is silent as to prioritizing between persons on the new commercial mooring waiting list and those on the re-designation list. Newport may wish to consider addressing, through the ordinance, the preference, if any, to those who seek re-designation or clarifying that all applicants for commercial mooring permits, irrespective of previous or current licensee status, are placed in a common pool.

---

<sup>131</sup> Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, Appendix B (April 2010).

<sup>132</sup> R.I. Admin. Code 16-1-13:B (West 2010).

<sup>133</sup> Newport Code of Ordinances 12.28.130(O)(1), *available at* [http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode Island](http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode%20Island).

<sup>134</sup> Id.

<sup>135</sup> Personal Communication with Hank Kniskern, February 25<sup>th</sup>, 2010, Roger Williams University School of Law, Marine Affairs Department.

<sup>136</sup> The Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, pg. 107 (April 2010)

Decisions about allocating between new and re-designation applicants raise a host of other policy considerations, any extended discussion of which is beyond the scope of this report. On one hand, giving priority to transferees would allow an additional recreational user to obtain a mooring. On the other hand, the priority gives fuels any false sense that the existing mooring holder is “entitled” to benefits beyond the one year term of his or her residential license.

In summary, Newport, in balancing between commercial and private interests, has tipped the scale at 3:1 in favor of private users. Newport continued efforts to enforce the differences between the two types of mooring permits facilitate accuracy in fee assessments and ratio reporting. In addition to continued enforcement, clarifying the procedure for re-designation from private to commercial will further Newport’s goal of achieving commercial: private balance.

## **VI. Resident: Non-Resident Ratio**

The Newport ordinance requires that residents be given a preference for mooring spaces over non-residents in a ratio of 3:1. While that is the target ratio, the actual occupancy was estimated at 1:1 in the Harbor Plan.<sup>137</sup> The discrepancy may be attributable to the fact that the ordinance does not adjust for any changes in residency after the mooring permit is initially granted. While the mooring holder is required to “notify the harbormaster of any change of address,” the ordinance does not indicate the significance of such data beyond serving as the valid contact information for registration renewal.<sup>139</sup>

One option of enforcing the 3:1 ratio is to require proof of residency upon each renewal in order for a private resident permittee to retain mooring benefits. Adopting such a policy could be implemented using an explicit disclaimer that change in residency amounts to forfeiture. It would also require a system for adding those who lose the residency preference to a waiting list for non-residents.

The resident preference ratio is consistent with Newport’s harbor management goals. Because Newport residents live closer to their moorings, they are more likely to put them to

---

<sup>137</sup> Newport Code of Ordinances 12.28.130(O)(1), *available at* [http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode Island](http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode%20Island).

<sup>138</sup> Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, pg. 108 (April 2010).

<sup>139</sup> Newport Code of Ordinances 12.28.130(C)(1), *available at* [http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode Island](http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode%20Island).

optimum use. Therefore, enforcing residency requirements for renewal would further Newport's goal of "achieving maximum sustainable benefits of moorings in Newport harbor,"<sup>140</sup> which is discussed in further in Section VII of this report.

The ratio is also consistent with CRMC limit that the ratio be no greater than 3:1. However, CRMC has explained that Army Corps rather than state policy applies to moorings within "federal navigation project" areas.<sup>141</sup> In the federal project areas, the "open to all on a fair and equitable basis" standard applies.<sup>142</sup> This creates some potential inconsistency, which would be resolved should the boundaries of the "federal project areas" be re-designated, as contemplated in the Harbor Plan.<sup>143</sup> Because the applicability of the Corps policy is subject to change, the remainder of this section focuses on sources of law and policy other than the Corps' policies. While all of Newport's moorings still remain subject to Corps jurisdiction per the Rhode Island General Permit, the permit does not contain an express "open to all" condition.<sup>144</sup>

It is uncertain whether the PTD itself requires following an "open to all" policy. There are three cases that are related to but far from decisive of the issue. One decision from a federal district court in Maine invalidated a municipalities denial of a permit to a non-resident when there was no waiting list.<sup>145</sup> Their reasoning was based on the fact that the 10% non-resident ratio employed should not apply unless it is actually benefiting residents.<sup>146</sup> Where there were no residents vying for mooring space, the municipality could not arbitrarily refuse to grant permits to non-residents. While not addressing resident preference, the Illinois Supreme Court faced the related issue of differential fees for residents and non-residents.<sup>147</sup> It declined to decide the case based on the public trust doctrine, however, resorting to the Equal Protection Clause analysis explored below.<sup>148</sup> Finally, New Jersey's interpretation of the PTD prohibits preferring

---

<sup>140</sup> Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, pg. 106 (April 2010).

<sup>141</sup> R.I. Admin. Code 16-1-13-B (West 2010).

<sup>142</sup> Id.

<sup>143</sup> Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, pg. 101 (April 2010).

<sup>144</sup> Department of the Army, Programmatic General Permit, State of Rhode Island, General Permit No. NAE-2006-2711, Appendix A, pg. 4 (February 13, 2007), *available at* [http://www.nae.usace.army.mil/reg/Permits/RI\\_PGP.pdf](http://www.nae.usace.army.mil/reg/Permits/RI_PGP.pdf).

<sup>145</sup> Griffin v. Town of Cutler, 2006 WL 2668460 (D.Me 2006), at \*8.

<sup>146</sup> Id. This case is interesting because it phrases the ratio as a preference for non-residents when residents reach a 90% occupancy, contrasted to Newport's approach that expresses the ration as a preference for residents when non-residents reach a 25% occupancy.

<sup>147</sup> Broeckl v. Chicago Park, 544 N.E.2d 792 (Ill. 1989).

<sup>148</sup> Id.

residents over non-residents.<sup>149</sup> The New Jersey approach should be considered in light of their more expansive construction of state public trust law.<sup>150</sup> Because of the lack of authorities on this issue, Rhode Island will charter its own course as it faces legal questions dependent on its resolution.

Regardless of any Army Corps or PTD issues surrounding the residence preference, the policy must comport with relevant provisions of the United States Constitution. Other harbor cities have faced Equal Protection challenges to their resident preference policies. The Equal Protection Clause of the Fourteenth Amendment prevents state and local law from *irrationally* distinguishing between two groups of people—here the resident and non-resident group.<sup>151</sup> Reviewing courts have given great deference to harbor cities, requiring only that the preference for non-residents serves a legitimate governmental purpose and the use of the ratio to implement the preference is rationally related to Newport’s goals.<sup>152</sup> This low level judicial scrutiny applies because “the right of access to mooring privileges is not a fundamental right” under the United States Constitution.<sup>153</sup>

There are at least two rational reasons for Newport to prefer its residents over non-residents. First, as mentioned previously, residents may be more likely to make maximum use of the moorings throughout the season, which furthers Newport’s harbor goals.<sup>154</sup> Second, city residents may also legitimately preferred by local governments because they pay state taxes and contribute to the economy by employment, whereas non-residents do not.<sup>155</sup> This second reason supports both the ratio preference and the fee difference of one hundred dollars.<sup>156</sup> The United

---

<sup>149</sup> Neptune City v. Avon-by-the-Sea, 294 A.2d 47, 55 (N.J.1972)

<sup>150</sup> See, e.g. Brian Weeks, *Public Rights of Access to and Use of the Shores of Tidal Waterways in New Jersey*, New Jersey Lawyer, p. 6 (2005), available at <http://oceanbeachshoresclub.org/documents/bylawsOrder/PubliRightofAccess.pdf>.

<sup>151</sup> Black’s Law Dictionary, 9<sup>th</sup> ed. (West 2009) (“In today’s constitutional jurisprudence, equal protection means that legislation that discriminates must have a rational basis for doing so.”).

<sup>153</sup> Hawaiian Navigable Waters Preservation Soc. v. State of Hawaii, 823 F.Supp. 766, 776 (D. Haw., 1993); See also Hawaii Boating Ass’n v. Water Transp. Facilities Division, 651 F.2d 661, 666 (9<sup>th</sup> Circ. 1981) (“Since this case does not involve a ‘penalty; on the right to travel or a suspect class, the legislative classification must be tested by the rational basis standard”).

<sup>154</sup> Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, pg. 106 (April 2010).

<sup>155</sup> See Baldwin v. Fish & Game Comm’n of Montana, 436 U.S. 371, 404 (1978). Note that if the distinction were made between state residents and out-of-state residents, the ordinance would also be subject the Privileges and Immunities Clause of the Fourteenth Amendment.

<sup>156</sup> Newport Code of Ordinances 12.28.130(D), available at [http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode Island](http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode%20Island).

States Supreme Court has explained that non-residents can be charged higher fees “based on both the added enforcement costs and the conservation expenditure supported by resident-borne taxes.”<sup>157</sup> Specifically applying this rationale to mooring fees, the Supreme Court of Illinois stated that “if the mooring fees charged to both residents and nonresidents were the same, the residents of the park district would be paying a disproportionate share of the costs of maintaining the park district’s services and facilities.”<sup>158</sup>

Therefore, the resident: non-resident ratio is consistent with the Equal Protection Clause and with CRMC policy. The preference for residents promotes the goal of increasing mooring utilization. Requiring proof of residency for renewal of a resident mooring permit would further promote the utilization goal. Additional methods of increasing utilization are discussed in the next section (VII).

## **VII. Mooring Underutilization**

Newport faces the constant challenge of mooring unavailability and delay, as witnessed by its long waiting lists. The problem is further complicated by mooring underutilization. Specifically, some people on the waiting list wait over a decade for a mooring, while others have mooring rights but rarely use them. Commercial moorings tend to be adequately utilized because the commercial permittee’s profit depends on maximum utilization. However, it is the private moorings that are grossly underutilized. While private moorings serve to further permittee’s exercise of public trust rights of navigation and fishing, underutilization calls into question whether or not such rights are actualized. In doing so, underutilized moorings compromise Newport’s goal of promoting “maximum sustainable usage of moorings and anchorages.”<sup>159</sup> There are at least five situations leading to mooring underutilization; the permittee:

---

<sup>157</sup> *Baldwin v. Fish & Game Comm’n of Montana*, 436 U.S. 371, 404 (1978).

<sup>158</sup> *Broeckl v. Chicago Park*, 544 N.E.2d 792, 797 (Ill. 1989). The public trust doctrine applies to navigable lakes. *See, e.g. Nat’l Audubon Soc’y v. Superior Court of Alpine County*, 658 P.2d 709, 712 (Cal. 1983) (discussing the “public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes”).

<sup>159</sup> The Newport Waterfront Commission, *City of Newport Comprehensive Harbor Management Plan*, p. 97 (April 2010).

- (1) the permittee has an alternative primary port and uses the Newport mooring only as a weekend visitor (14% of lessees);<sup>160</sup>
- (2) leaves the vessel in dry dock storage or otherwise not on the mooring (17%);<sup>161</sup>
- (3) uses the mooring for a minimal portion of the boating season;<sup>162</sup>
- (4) uses a low-value and unused “decoy vessel” to preserve the license without actual use;<sup>163</sup> or
- (5) keeps the vessel at a dock, using the mooring only during storms.<sup>164</sup>

Finally, moorings may become underused at the expense of the waiting list when private permits are issued to business entities rather than natural persons. One way this occurs is when the mooring is registered to a vessel that is owned by a partnership. The Commission addressed this issue in its March 10, 2011 appeal hearing for a mooring forfeiture. The Newport resident permit holder decided to move out of state and stopped using the mooring. In order to preserve it for himself should he choose to return to Newport (which he stated would not be until his retirement), he transferred the ownership of the registered vessel from himself to a partnership between himself and a Newport resident. The two partners were not business partners. In fact, they formed the partnership by a two sentence “Partnership Document” which they submitted as an un-notarized photo-copy. The partner remaining in Newport already had his own mooring.

Therefore, the partnership enabled avoidance of the waiting list procedure established by Newport ordinance, preserving the mooring for the non-resident partner for the future, while leaving a coveted mooring space unused. These kinds of arrangements prevent others who dutifully complied with the waiting list procedure from achieving a long-awaited permit. Other municipalities have enacted some protections against such abuses by clarifying that joint ownership must appear on the original application, preventing adjustments to the business structure of the permittee that circumvent the goals of the mooring ordinances.<sup>165</sup>

One approach to increasing maximum mooring utilization is habitual use requirements. The most stringent implementation of habitual use policy is a “use-or-forfeit” provision. In

---

<sup>160</sup> *Id.* at 95, 151.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 95.

<sup>163</sup> *Id.* at 110.

<sup>164</sup> *Id.* at 110.

<sup>165</sup> *Manchester Harbor Mooring & Waterway Regulations*, p. 5 (March 2011), *available at* [http://www.manchester.ma.us/Pages/manchesterma\\_harbor/Regs.pdf](http://www.manchester.ma.us/Pages/manchesterma_harbor/Regs.pdf).



Beverly, Massachusetts, for example, a permittee suffers automatic permit revocation if he or she does not meet the habitual use requirement of 45 days between June 15<sup>th</sup> and September 15<sup>th</sup>.<sup>166</sup>

A less stringent approach is a “use-or-let-use” approach whereby the harbormaster is given the authority to make unused moorings available to transient boaters.<sup>167</sup> This has been implemented in Manchester-by-the-Sea, Massachusetts.<sup>168</sup> The harbor regulations require that the registered vessel occupies the mooring for 60 days each season defined between June 1<sup>st</sup> and October 1<sup>st</sup>.<sup>169</sup> The permittee is required to notify the harbormaster if he or she does not expect to meet the habitual use condition.<sup>170</sup> Upon notification, the habitual use requirement may be waived for one year.<sup>171</sup> The ordinance only allows for one waiver, however, making future failure to meet the habitual use requirement grounds for forfeiture.<sup>172</sup>

While enforcing habitual use requirements is unquestionably difficult, having a habitual use provision in an ordinance serves at least two purposes. First, the mere presence of the requirement, despite lack of any enforcement mechanism akin to a parking meter, may compel at least some permittees to increase their mooring use or to decide to “let use” to avoid the risk of forfeiture, however slight. Second, a habitual use provision provides a grounds for forfeiture in cases of the most obvious violations. While the harbormaster could not be expected to count the mooring days of each boat, the provision gives the city the legal ability to remedy those violators who have not used the mooring for years.

Under the use-or-let-use approach, if a city decides to offer an under-utilized mooring on a transient or seasonable basis, it could face added liability. Because the city would be offering both the space and the mooring equipment to the transient or single-season user, it could be held responsible for damages associated with those moorings.<sup>173</sup> Potential liability may further obligate the city to take on “providing security patrols, preventing chafing during storms and

---

<sup>166</sup> Beverly Harbor & Mooring Regulations, IV(16), available at <http://harbormasters.org/beverly/moorreg.htm>.

<sup>167</sup> The Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, p. 111 (April 2010)(“utilize empty private moorings with the license holder’s agreement”).

<sup>168</sup> Manchester Harbor Mooring & Waterway Regulations, p. 9 (March 2011), available at [http://www.manchester.ma.us/Pages/manchesterma\\_harbor/Regs.pdf](http://www.manchester.ma.us/Pages/manchesterma_harbor/Regs.pdf).

<sup>169</sup> Id.

<sup>170</sup> Id.

<sup>171</sup> Id.

<sup>172</sup> Id.

<sup>173</sup> Mark Amaral, *Harbormaster Liability, Reducing Risk*. URI Coastal Resources Center Education Series: ES3039; Rhode Island Sea Grant Publication: P1289 (1993), p. 5, available at <http://nsgd.gso.uri.edu/riu/riue92005.pdf>.

assuring the general well-being of the vessel.”<sup>174</sup> This is in contrast to Newport’s liability under the current mooring regime where it acts only as the “surface manager,” with the permittee having ownership of, and therefore liability for, any damages associated with that mooring equipment.<sup>175</sup>

Another potential solution is allowing Newport yacht clubs to which a permittee belongs to offer the mooring through the yacht club in lieu of reciprocity benefits. The Harbor Plan contemplates this solution: “private permit holders who are members of a yacht club be allowed to make their mooring available to their yacht club for the sole purpose of the club being able to offer ‘yacht club transient guest moorings’ to other yacht clubs with which they have a ‘reciprocal privileges agreement.’”<sup>176</sup> This solution addresses the problem of underuse while maintaining the prohibition on receiving *monetary* compensation for use by others. Instead, the lessee and the yacht club would receive the benefit of reciprocity privileges.

Under the current ordinance, a permittee wishing to make his or her mooring available to the yacht club face two limiting provisions regulating use by vessels other than the one registered to the mooring. Newport’s ordinance allows use by non-registered vessels only if two requirements are met: (a) the 7/14 day time limit, and (b) prior written request by the mooring lessee.<sup>177</sup> With the guarantee that permittee not receive compensation from the yacht club or the user, the time limit may prove to be an unnecessary restriction. The second requirement is an inconvenience that may deter the mooring holder. The option might be more desirable if the harbormaster was authorized accept a written request from the yacht club, acting as the lessee’s agent. Alternatively, the ordinance could specifically address the yacht club scenario, by requiring only one written request by the lessee to allow for future use by multiple reciprocating yacht club members. One drawback of the yacht club solution is that its success depends entirely on the contract agreement between the yacht club and the mooring lessee. If the yacht club decides it is not economical to assume the additional liability for aiding mooring use, the moorings will remain underutilized and out of the city’s control.

---

<sup>174</sup> Id.

<sup>175</sup> Id.

<sup>176</sup> The Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, p. 111 (April 2010).

<sup>177</sup> Newport Code of Ordinances 12.28.130(D)(4), *available at* [http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode Island](http://library.municode.com/index.aspx?clientId=16524&stateId=39&stateName=Rhode%20Island).

Regarding users who are using the mooring only during storms, Newport could inform them of their other options. The Harbor Plan contemplates establishing a temporary hurricane anchorage area in Coddington Cove.<sup>178</sup> This could reduce the underuse problem for licensees who have docks available under normal weather conditions. Newport's authorizing statute provides that in addition to its power to site permanent moorings, the city may designate both temporary mooring or anchorage areas, which supports Newport's ability to go forward with this recommended action.<sup>179</sup>

While underutilization is a serious problem for Newport, it is not incurable. Newport may explore habitual use requirements, including use-or-forfeit or use-or-let-use strategies. Alternatively, Newport may avoid incurring any additional liability by allowing yacht clubs to offer members' moorings for reciprocity benefits. Whichever solution Newport adopts, maximizing use of existing moorings will greatly improve the mooring system's promotion of public trust uses as well as maintain favorable public perception in the system's fairness.

### **VIII. Mooring Fee Profit and The Maritime Enterprise Fund**

This section explores the how mooring fee profits are managed in Newport's Maritime Enterprise Fund (MEP), with some useful comparisons to fund administration in Newport. This section also addresses whether profit-making is consistent with the PTD.

The proceeds from mooring fees are deposited into Newport's MEP.<sup>180</sup> Enterprise funds are an accounting mechanism by which a city providing a particular service, like harbor management, retains control of the revenues the service, rather than dispensing the revenue into the city's general fund.<sup>181</sup> The funds in the MEP cover the Harbor's operating expenses, with any surplus (profits) becoming available for harbor development projects.<sup>182</sup> This fund management benefit is achieved by separate accounting ledgers but not necessarily by separation

---

<sup>178</sup> The Newport Waterfront Commission, City of Newport Comprehensive Harbor Management Plan, p. 101 (April 2010).

<sup>179</sup> See, e.g. R.I. Gen. Laws § 46-4-6.6 (West 2011) (Newport), available at <http://www.rilin.state.ri.us/Statutes/TITLE46/46-4/46-4-6.6.HTM>.

<sup>180</sup> Personal Communication with Hank Kniskern, February 25<sup>th</sup>, 2010, Roger Williams University School of Law, Marine Affairs Department.

<sup>181</sup> Massachusetts Department of Revenue, Division of Local Services, Bureau of Accounts, Informational Guideline Release 08-101, Enterprise Funds G.L. c. 44, § 53F ½, pg. 2 (April 2008).

<sup>182</sup> See City of Newport Waterfront Commission, Meeting Minutes of November 13, 2008. The cited notes were based on presentation from Laura Sitrin, Director, City of Newport Finance Department.

of funds among several bank accounts.<sup>183</sup> Enterprise Funds are regarded as a business for purposes of government accounting practices.

The Army Corps of Engineers also speaks to the revenue rules. The agency objects to fees that are not a reflection of the cost of administering a mooring area.<sup>184</sup> This no-profit policy, like the open-to-all policy, is not stated in the conditions for Rhode Island's General Permit for issuing mooring licenses, but may apply in the federal navigation project areas subject to upcoming change. The question of whether Newport's profit practices meet the proportionality requirement is complicated by the MEP system for two reasons. First, the MEP combines profits from other harbor fines and fees, the city's mooring rentals, and cruise ships. Second, the funds are used for a variety of costs that are not exclusive to the mooring program: *e.g.* paperwork, harbor master duties, harbor staff during peak season.

The proportionality requirement is not universally recognized. While some jurisdictions hold that the fees must be proportional to the actual cost of implementing the program, many decisions are based on an applicable state statute setting forth a proportionality standard.<sup>185</sup> The applicable Rhode Island statute for Newport's authority to charge mooring fees does not include any requirement that the fees be proportional to the cost of implementing the program. By contrast, Massachusetts has adopted proportionality requirement by statute.<sup>186</sup> Because of such difference in state law, the Rhode Island Supreme Court specifically cautioned against confusion, urging "great caution" when applying out-of-state cases to Rhode Island issues.<sup>187</sup>

---

<sup>183</sup> See Massachusetts Department of Revenue, Division of Local Services, Bureau of Accounts, Informational Guideline Release 08-101, Enterprise Funds G.L. c. 44, § 53F 1/2, pg. 36 (April 2008). The Guideline Release also indicates that the "department operating the enterprise is not a separate and distinct legal entity". *Id.* at 37. The legal implication is that one department or the City Council is held liable for tort or contract claim, creditors whose claims are not satisfied by the relevant enterprise fund would be able to reach any of the city's other unrelated enterprise funds. See generally 18 Am. Jur. 2d Corporations § 63 (West 2011).

<sup>184</sup> R.I. Admin. Code 16-1-13-B (West 2010).

<sup>185</sup> See, *e.g.* Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, 851 A.2d 19, 33 (N.J. Super. Ct. 2004). The distinction between a statutory basis for invalidating fees and a public trust basis for doing so can be confusing. Raleigh exemplifies this by quoting the state statute right in the middle of a public trust discussion.

<sup>186</sup> M.G.L.A. 91 § 10A (West 2011), available at <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXIV/Chapter91/Section10A> ("A reasonable fee for such mooring permit, proportionate to the city or town's cost of overseeing mooring permits, may be imposed by the city or town or whoever is so authorized by the city or town.")

<sup>187</sup> Greater Providence Chamber of Commerce v. Rhode Island, 657 A.2d 1038, 1042 (R.I. Sup. Ct. 1995), quoting Shively v. Bowlby, 152 US 1, 26 (1894), available at [http://www.rhodeislandpropertylaw.com/uploads/file/Greater%20Providence%20Chamber%20Case\(1\).pdf](http://www.rhodeislandpropertylaw.com/uploads/file/Greater%20Providence%20Chamber%20Case(1).pdf).

Another problem in trying to apply the proportionality cases is that their underlying regulatory concern is often with the reasonableness of the fees rather than the fact that the city is making a profit.<sup>188</sup> Therefore, the real determination of validity of the fees under the PTD should depend on whether the fees are so high that they are unreasonably prohibiting the exercise of public trust rights for those who cannot pay, not on whether the city is making profits. Recognizing these distinctions, the Supreme Court of Illinois, after pointing out the fact that its relevant state statute also lacked any proportionality limit, concluded that nothing in the PTD itself prevents the city to make profit on mooring fees.<sup>189</sup> The court recognized the need for harbor cities to raise revenues for successful harbor management and upheld profit-producing mooring fees based on a reasonableness standard.<sup>190</sup> Therefore, the real issue is whether the fee is reasonable in light of an average boat owner's ability to pay, rather than in comparison to the cost of administering the program.

Furthermore, some states that have required proportionality have construed it broadly. The New Jersey Supreme Court, for example, allows municipalities to calculate beach use fees based on a wide-range of beach-related costs outside the cost of implementing the specific beach fee program.<sup>191</sup> These include "all additional costs legitimately attributable to the operation and maintenance of the beachfront."<sup>192</sup> The court gave several examples of what the city could include in its fee calculation, including all operating and personnel expenses, outstanding debt related to beach improvement, and annual reserve to cover anticipated expenses relating to beach improvement.<sup>193</sup>

While the PTD does not necessarily invalidate Newport's collection of profits, it may impose the requirement that the profits be expended to improve the public trust resource. For example, the Supreme Florida Court explained that while "the public trust doctrine...does not prohibit local governments from imposing *reasonable user fees* for [public trust resource] access,

---

<sup>188</sup> Neptune City v. Avon-by-the-Sea, 294 A.2d 47, 55 (N.J.1972) ("The rationale behind [the statutory proportionality requirement] certainly is that such municipalities may properly pass on some or all of the financial burden, as they decide, by imposing *reasonable* beach user fees")(emphasis supplied).

<sup>189</sup> Broeckl v. Chicago Park Dist., 544 N.E.2d 792, 794 (Ill. 1989). The public trust doctrine applies to navigable lakes. See, e.g. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 712 (Cal. 1983) (discussing the "public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes").

<sup>190</sup> Id.

<sup>191</sup> Neptune City v. Avon-by-the-Sea, 294 A.2d 47, 55 (N.J. 1972).

<sup>192</sup> Id.

so long as the revenue is *expended solely for the protection and welfare of the public using that [public trust resource], as well as for improvements that will enhance the public's use of the sovereign property*" (*emphasis supplied*).<sup>194</sup> Fortunately, that is exactly what the MEP facilitates. The MEP is designed to ensure that the profits from mooring fees are expended in ways that improve the Harbor. Because the MEP is used to keep profits for use of the public beneficiaries of the public trust doctrine, the MEP might be likened to a trust account. Similar to Newport's MEP, San Diego's harbor fund has been said to "constitute a trust fund for the furtherance of navigation and commerce, in which were to be placed all revenues derived from tideland leases and franchises, and other income from harbor improvements, to be devoted to the purposes of the trust."<sup>195</sup>

While the MEP is generally administered consistent with this trust responsibility, there seem to be two exceptions to the requirement that funds in the MEP be used for harbor management and development. First, the Newport Department of Economic Development has the ability to draw from the MEP for indirect costs, in order to fund either harbor-*related* expenses<sup>196</sup> (e.g. seawalls) or municipal costs that cannot be attributed to use by a single enterprise<sup>197</sup> (e.g. city solicitor). There is no corollary benefit assuring that other funds would reimburse the Harbor Fund for its use of harbor services.<sup>198</sup> For example, the harbormaster responds to incidents at piers, docks, and marinas without any compensation from the General Fund. The General Fund receives tax revenues from the marinas, with the tax-payers receiving the benefit of the harbormaster's Services. Second, undercapitalized funds may be able to "borrow" from other funds.<sup>199</sup> The latter aspect is vested in the authority of the Department of Economic Development.<sup>200</sup>

---

<sup>193</sup> Id.

<sup>194</sup> City of Daytona Beach Shores v. State, 483 So.2d 405, 408 (Fla. 1986).

<sup>195</sup> Atwood v. Hammond, 48 P.2d 20, 27 (Cal. 1935), *available at* [http://scholar.google.com/scholar\\_case?case=1377038613279570502&q=48+P.2d+20&hl=en&as\\_sdt=2,40](http://scholar.google.com/scholar_case?case=1377038613279570502&q=48+P.2d+20&hl=en&as_sdt=2,40).

<sup>196</sup> See City of Newport Waterfront Commission, Meeting Minutes of November 13, 2008 (Notes based on presentation from Laura Sitrin, Director, City of Newport Finance Department).

<sup>197</sup> Massachusetts Department of Revenue, Division of Local Services, Bureau of Accounts, Informational Guideline Release 08-101, Enterprise Funds G.L. c. 44, § 53F 1/2,7 (April 2008).

<sup>198</sup> Personal Communication with Hank Kniskern, March 7, 2010.

<sup>199</sup> See City of Newport Waterfront Commission, Meeting Minutes, November 13, 2008 (Notes based on presentation from Laura Sitrin, Director, City of Newport Finance Department).

<sup>200</sup> Id.

In contrast to the administration of the MEP, enterprise funds under Massachusetts law are administered in accordance with a codified comprehensive scheme for municipal enterprise funds.<sup>201</sup> This system replaced the state's old system of diverse acts for each proposed fund.<sup>202</sup> The statute also expanded the municipalities' flexibility in administering their funds, authorizing indirect costs, capital improvements, and fixed assets. Pursuant to the statute, cities or town can create an enterprise fund by vote of the city's legislative branch (*e.g.* the City Council).<sup>203</sup> The Enterprise Fund annual budget must be approved by the city's executive branch is then subject to approval by the city's executive branch (*e.g.* the Governor) and the legislative branch.<sup>204</sup> The United States Court of Appeals for the First Circuit, which also has jurisdiction over federal Rhode Island case, favorably cited to the Waterways Management Enterprise Fund established by the City of Dartmouth.<sup>205</sup> After explaining "the fund is financed by a waterways use fee," the court applied the benefits of enterprise fund management system to its analysis of a claim that the user fees were unreasonable.<sup>206</sup> The appeals court held that the fees were reasonable in part because they were being used solely for waterway-related expenses.<sup>207</sup>

Like Newport's MEP, Massachusetts has also faced some of the problems associated with allocation of indirect costs not attributable to one single city enterprise. The Massachusetts Bureau of Accounts recommends that "every community with an enterprise fund establish a written, internal policy regarding indirect cost allocation," to be reviewed annually.<sup>208</sup>

The MEP serves as an effective means of ensuring that mooring profits are used for other public trust purposes in the harbor. This benefit to the public trust resource and the reasonableness of the fees for paying boat owners are evidence of the fees' compliance with the PTD.

---

<sup>201</sup> Massachusetts Department of Revenue, Division of Local Services, Bureau of Accounts, Informational Guideline Release 08-101, Enterprise Funds G.L. c. 44, § 53F ½, pg. 2(April 2008).

<sup>202</sup> Id.

<sup>203</sup> Id., providing sample language for an enterprise fund adoption vote: "To see if the (city or town) will accept the provisions of Chapter 44, § 53F½ of the Massachusetts General Laws establishing (the service) as an enterprise fund effective fiscal year (year)"(parentheticals in original).

<sup>204</sup> Id.

<sup>205</sup> LCM Enterprises v. Dartmouth, 14 F.3d 675, 684 (1<sup>st</sup> Circ. 1994), *available at* <http://openjurist.org/14/f3d/675/lcm-enterprises-inc-v-town-of-dartmouth>.

<sup>206</sup> Id.

<sup>207</sup> Id.

<sup>208</sup> Massachusetts Department of Revenue, Division of Local Services, Bureau of Accounts, Informational Guideline Release 08-101, Enterprise Funds G.L. c. 44, § 53F ½, pg. 7 (April 2008).

## **IX. Conclusion**

The legal and policy issues facing Newport as it revises and implements its ordinances are numerous. Most of the issues have not been squarely resolved for Rhode Island. While Newport may take guidance from other states, it will be Rhode Island's task going forward to define the reach of its PTD as applied to some novel issues raised by mooring administration. The benefit of the flexibility of the PTD is allowing smaller units of government like Newport to define their regulatory goals based on a locally-tailored balancing test of competing interests facing scarce ocean resources. This report was designed to facilitate decision-maker discussion of how to strike that delicate balance.



## Appendix A: Reference Guide for Comparing Other Municipalities' Ordinances

RHODE ISLAND	HARBOR PLAN LINK	ORDINANCES LINK
Barrington	<a href="http://72.46.3.26/harbor/HarborMgtPlan01-05-09complete.pdf">http://72.46.3.26/harbor/HarborMgtPlan01-05-09complete.pdf</a>	
Bristol	<a href="http://www.bristolri.us/harbor/harbormgmtplan.php">http://www.bristolri.us/harbor/harbormgmtplan.php</a>	<a href="http://library.municode.com/index.aspx?clientId=10105&amp;stateId=39&amp;stateName=Rhode%20Island">http://library.municode.com/index.aspx?clientId=10105&amp;stateId=39&amp;stateName=Rhode%20Island</a>
Jamestown		<a href="http://www.jamestownri.net/harbor/HMO/Harbor_Ordinance_2004.pdf">http://www.jamestownri.net/harbor/HMO/Harbor_Ordinance_2004.pdf</a>
Narragansett	<a href="http://narragansettri.gov/admin/DocumentView.aspx?DID=416&amp;DL=1">http://narragansettri.gov/admin/DocumentView.aspx?DID=416&amp;DL=1</a>	<a href="http://library4.municode.com:80/default-now/template.htm?view=browse&amp;doc_action=setdoc&amp;doc_keytype=tocid&amp;doc_key=46385008ec6f4f2d7bea6a7aa1c1a451&amp;infobase=11204">http://library4.municode.com:80/default-now/template.htm?view=browse&amp;doc_action=setdoc&amp;doc_keytype=tocid&amp;doc_key=46385008ec6f4f2d7bea6a7aa1c1a451&amp;infobase=11204</a>
Newport	<a href="http://www.cityofnewport.com/departments/economic-development/harbor/pdf/HMP_01-2010.pdf">http://www.cityofnewport.com/departments/economic-development/harbor/pdf/HMP_01-2010.pdf</a>	-
North Kingstown	<a href="http://www.northkingstown.org/sites/northkingstown.org/files/pdf-attachments/harbor_management_plan_2007.pdf">http://www.northkingstown.org/sites/northkingstown.org/files/pdf-attachments/harbor_management_plan_2007.pdf</a>	<a href="http://library4.municode.com:80/default-test/template.htm?view=browse&amp;doc_action=setdoc&amp;doc_keytype=tocid&amp;doc_key=753045e315ba7ccc272bb4e126a6fae8&amp;infobase=11995">http://library4.municode.com:80/default-test/template.htm?view=browse&amp;doc_action=setdoc&amp;doc_keytype=tocid&amp;doc_key=753045e315ba7ccc272bb4e126a6fae8&amp;infobase=11995</a>
Providence		<a href="http://library.municode.com/index.aspx?clientId=11458&amp;stateId=39&amp;stateName=Rhode%20Island">http://library.municode.com/index.aspx?clientId=11458&amp;stateId=39&amp;stateName=Rhode%20Island</a>
South Kingstown		<a href="http://library.municode.com/index.aspx?clientId=14928&amp;stateId=39&amp;stateName=Rhode%20Island">http://library.municode.com/index.aspx?clientId=14928&amp;stateId=39&amp;stateName=Rhode%20Island</a>
Tiverton		<a href="http://library.municode.com/index.aspx?clientId=12864&amp;stateId=39&amp;stateName=Rhode%20Island">http://library.municode.com/index.aspx?clientId=12864&amp;stateId=39&amp;stateName=Rhode%20Island</a>
Warren	<a href="http://www.townofwarren-ri.gov/images/Harbor_Management_Plan_Updated_Jan_2010.pdf">http://www.townofwarren-ri.gov/images/Harbor_Management_Plan_Updated_Jan_2010.pdf</a>	
Warwick	<a href="http://www.warwickri.gov/pdfs/planning/Harbor%20Management%20Plan.pdf">http://www.warwickri.gov/pdfs/planning/Harbor%20Management%20Plan.pdf</a>	<a href="http://www.warwickri.gov/pdfs/officialdocs/CH024%20-%20Chapter%2024%20-%20HARBORS.pdf">http://www.warwickri.gov/pdfs/officialdocs/CH024%20-%20Chapter%2024%20-%20HARBORS.pdf</a>
MASSACHUSETTS	HMP LINK	ORDINANCE LINK
Barnstable		<a href="http://www.town.barnstable.ma.us/HarborMaster/Mooring%20Regulations.pdf">http://www.town.barnstable.ma.us/HarborMaster/Mooring%20Regulations.pdf</a>
Beverly		<a href="http://www.harbormasters.org/cgi-bin/search/proxy.cgi?terms=mooring&amp;url=http%3A%2F%2Fwww.harbormasters.org%2Fbeverly%2Fmoorreg.htm">http://www.harbormasters.org/cgi-bin/search/proxy.cgi?terms=mooring&amp;url=http%3A%2F%2Fwww.harbormasters.org%2Fbeverly%2Fmoorreg.htm</a>
Bourne		<a href="http://www.townofbourne.com/LinkClick.aspx?fileticket=XOaIPoDVgek%3D&amp;tabid=157&amp;mid=819">http://www.townofbourne.com/LinkClick.aspx?fileticket=XOaIPoDVgek%3D&amp;tabid=157&amp;mid=819</a>
Chatham	<a href="http://www.town.chatham.ma.us/Public_Documents/ChathamMA_Coastal/tocscpdocs">http://www.town.chatham.ma.us/Public_Documents/ChathamMA_Coastal/tocscpdocs</a>	<a href="http://www.chatham-ma.gov/Public_Documents/ChathamMA_Harbor/regulations/MOORINGREGS2008.pdf">http://www.chatham-ma.gov/Public_Documents/ChathamMA_Harbor/regulations/MOORINGREGS2008.pdf</a>
Cohasset		<a href="http://www.townofcohasset.org/harbormaster/harbor_rules_regs.pdf">http://www.townofcohasset.org/harbormaster/harbor_rules_regs.pdf</a>
Duxbury	<a href="http://www.town.duxbury.ma.us/public_documents/DuxburyMA_BComm/BayManagementplanJune2005.pdf">http://www.town.duxbury.ma.us/public_documents/DuxburyMA_BComm/BayManagementplanJune2005.pdf</a>	<a href="http://www.duxburyharbormaster.org/Mooringrules.htm">http://www.duxburyharbormaster.org/Mooringrules.htm</a>
Eastham		<a href="http://www.eastham-ma.gov/Public_Documents/EasthamMA_Resources/mooring%20regulations%20abstract%202008.pdf">http://www.eastham-ma.gov/Public_Documents/EasthamMA_Resources/mooring%20regulations%20abstract%202008.pdf</a>
Falmouth	<a href="http://www.uhi.umb.edu/pdf_files/draft_green_pond_aug_20_09.pdf">http://www.uhi.umb.edu/pdf_files/draft_green_pond_aug_20_09.pdf</a>	<a href="http://www.falmouthmass.us/depart.php?depkey=harbor">http://www.falmouthmass.us/depart.php?depkey=harbor</a>
Gloucester	<a href="http://www.uhi.umb.edu/pdf_files/City%20of%20Gloucester%20Harbor%20Plan%20July%202009.pdf">http://www.uhi.umb.edu/pdf_files/City%20of%20Gloucester%20Harbor%20Plan%20July%202009.pdf</a>	
Hingham	<a href="http://www.hingham-ma.gov/document/Harbor_Master_Plan_Report.pdf">http://www.hingham-ma.gov/document/Harbor_Master_Plan_Report.pdf</a>	<a href="http://www.hingham-ma.gov/harbormaster/bylaw.html">http://www.hingham-ma.gov/harbormaster/bylaw.html</a>

Hull	<a href="http://www.town.hull.ma.us/Public_Documents/HullMA_HarborManagement%20Plan.pdf">http://www.town.hull.ma.us/Public_Documents/HullMA_HarborManagement%20Plan.pdf</a>	
Ipswich		<a href="http://www.ipswichpolice.org/Files/MOORING%20REGULATIONS%202011.pdf">http://www.ipswichpolice.org/Files/MOORING%20REGULATIONS%202011.pdf</a>
Lynn	<a href="http://ediclynn.org/misc/Final%20MHP%20Document.pdf">http://ediclynn.org/misc/Final%20MHP%20Document.pdf</a>	
Manchester by the Sea		<a href="http://www.manchester.ma.us/Pages/manchesterma_harbor/Regs.pdf">http://www.manchester.ma.us/Pages/manchesterma_harbor/Regs.pdf</a>
Marblehead		<a href="http://www.marblehead.org/DocumentView.aspx?DID=2491">http://www.marblehead.org/DocumentView.aspx?DID=2491</a>
Marshfield		<a href="http://www.townofmarshfield.org/public_documents/marshfieldma_harbor/MarshfieldmooringSkiffregulations.pdf">http://www.townofmarshfield.org/public_documents/marshfieldma_harbor/MarshfieldmooringSkiffregulations.pdf</a>
Nantucket	<a href="http://www.uhi.umb.edu/pdf_files/Nantucket_Madaket_Harbors_Action_Plan_2009.pdf">http://www.uhi.umb.edu/pdf_files/Nantucket_Madaket_Harbors_Action_Plan_2009.pdf</a>	<a href="http://www.nantucket-ma.gov/pages/nantucketma_marine/harborregs.pdf">http://www.nantucket-ma.gov/pages/nantucketma_marine/harborregs.pdf</a>
New Bedford	<a href="http://www.newbedford-ma.gov/PortofNewBedford/hdc/Final%20complete%207-15-09%20(web%20version).pdf">http://www.newbedford-ma.gov/PortofNewBedford/hdc/Final%20complete%207-15-09%20(web%20version).pdf</a>	<a href="http://www.newbedford-ma.gov/PortofNewBedford/hdc/Mooring%20Regulations%20NB.pdf">http://www.newbedford-ma.gov/PortofNewBedford/hdc/Mooring%20Regulations%20NB.pdf</a>
Plymouth		<a href="http://www.nantucket-ma.gov/pages/nantucketma_marine/harborregs.pdf">http://www.nantucket-ma.gov/pages/nantucketma_marine/harborregs.pdf</a>
Province Town	<a href="http://www.uhi.umb.edu/pdf_files/provincetown.pdf">http://www.uhi.umb.edu/pdf_files/provincetown.pdf</a>	
Quincy		<a href="http://www.quincyma.gov/CityOfQuincy_Content/documents/MooringRegs2007.pdf">http://www.quincyma.gov/CityOfQuincy_Content/documents/MooringRegs2007.pdf</a>
Rockport	<a href="http://www.uhi.umb.edu/pdf_files/Rockport_Harbor_Plan.pdf">http://www.uhi.umb.edu/pdf_files/Rockport_Harbor_Plan.pdf</a>	<a href="http://www.harbormasters.org/rockport/mooring.shtml">http://www.harbormasters.org/rockport/mooring.shtml</a>
Salem		<a href="http://www.salem.com/pages/salemma_dpdc/studiesrephttp://www.salem.com/pages/salemma_dpdc/studiesreports/2008%20salem%20Harbor%20plan.pdf">http://www.salem.com/pages/salemma_dpdc/studiesrephttp://www.salem.com/pages/salemma_dpdc/studiesreports/2008%20salem%20Harbor%20plan.pdf</a>
Salisbury	<a href="http://www.uhi.umb.edu/pdf_files/Salisbury_Management_Plan_Oct08.pdf">http://www.uhi.umb.edu/pdf_files/Salisbury_Management_Plan_Oct08.pdf</a>	
Sandwich		<a href="http://library.municode.com/index.aspx?clientId=11521&amp;stateId=21&amp;stateName=Massachusetts">http://library.municode.com/index.aspx?clientId=11521&amp;stateId=21&amp;stateName=Massachusetts</a>
Scituate		<a href="http://www.town.scituate.ma.us/harbormaster/mooringregs.html">http://www.town.scituate.ma.us/harbormaster/mooringregs.html</a>
Winthrop		<a href="http://www.town.winthrop.ma.us/pages/WinthropMA_Harbor/rules_regs">http://www.town.winthrop.ma.us/pages/WinthropMA_Harbor/rules_regs</a>